Supreme Court, U.S.
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No. 04-

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

MICHELLE L. BARTELS, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking the motorist a question unrelated to the traffic violation that justified the stop.

2. Whether the *Terry* doctrine governs police investigatory conduct during a lawful traffic stop justified by probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

I. This Court Should Resolve Whether The Fourth Amendment Prohibits Police, During a Lawful Traffic Stop, From Asking The Motorist Questions Unrelated To The Traffic Violation That Justified The Stop 6

A. The Lower Courts Are Deeply and Intractably Split on the Question Presented. 6

B. The Fourth Amendment Does Not Require Police To Have Reasonable Suspicion That Contraband Is Present Before Asking Questions About Contraband During A Traffic Stop 9

TABLE OF CONTENTS-Continued

Page

II. This Court Should Resolve Whether The *Terry* Doctrine Governs Police Investigatory Conduct During A Lawful Traffic Stop Justified By Probable Cause, Where The Investigatory Conduct Is Unrelated To The Traffic Violation That Justified The Stop 11

CONCLUSION 16

TABLE OF AUTHORITIES

Cases: **Page**

Arkansas v. Sullivan, 532 U.S. 769 (2001) 15

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) .. 14, 15

Barch v. State, 92 P.3d 828 (Wyo. 2004) 11

Berkemer v. McCarty, 468 U.S. 420 (1984) .. 12, 13, 14, 15

Florida v. Bostick, 501 U.S. 429 (1991) 9, 10

Hiibel v. Sixth Judicial Dist. Ct., 124 S. Ct. 2451 (2004) 14, 15

Illinois v. Caballes, 543 U.S. ___ (2005) 5, 10, 15, 16

Indianapolis v. Edmond, 531 U.S. 32 (2000) 9

Lockett v. State, 747 N.E.2d 539 (Ind. 2001) 8

Mena v. City of Simi Valley, 332 F.3d 1255 (9th Cir. 2003), cert. granted sub nom., *Muehler v. Mena*, 124 S. Ct. 2842 (2004) 12

People v. Bunch, 207 Ill. 2d 7, 796 N.E.2d 1024 (2003), cert. denied, 124 S. Ct. 1712 (2004) 11

People v. Caballes, 207 Ill. 2d 504, 802 N.E.2d 202 (2003), rev'd sub nom., *Illinois v. Caballes*, 543 U.S. ___ (2005) 11

People v. Gonzalez, 204 Ill. 2d 220, 789 N.E.2d 260 (2003) 4, 7, 8, 11, 13

People v. Gonzalez, 184 Ill. 2d 402, 704 N.E.2d 375 (1998), cert. denied, 528 U.S. 825 (1999) 11

People v. Harris, 207 Ill. 2d 515, 802 N.E.2d 219 (2003), pet. for cert. pending, No. 03-1224 (U.S.) 11

People v. Leigh, 341 Ill. App. 3d 492, 792 N.E.2d 809 (2003) 8

People v. Lomas, 349 Ill. App. 3d 462, 812 N.E.2d 39 (2004) 8

State v. Akuba, 686 N.W.2d 406 (S.D. 2004) 6

State v. Askerooth, 681 N.W.2d 353 (Minn. 2004) ... 13, 14

State v. Dickey, 152 N.J. 468, 706 A.2d 180 (1998) 12

State v. Gaulrapp, 207 Wis. 2d 600, 558 N.W.2d 696 (App. 1996), rev. denied, 208 Wis. 2d 213, 562 N.W.2d 603 (1997) 6

State v. Gibbons, 248 Ga. App. 859, 547 S.E.2d 679 (2001) 7

State v. McKinnon-Andrews, 151 N.H. 19, 846 A.2d 1198 (2004) 7, 8

State v. Middleton, 43 S.W.3d 881 (Mo. App. 2001) 6

State v. Parkinson, 135 Idaho 357, 17 P.3d 301 (App. 2000) 6

State v. Taylor, 126 N.M. 569, 973 P.2d 246 (App. 1998), cert. denied, 126 N.M. 534, 972 P.2d 353 (1999) ... 7

State v. Wiegand, 645 N.W.2d 125 (Minn. 2002) 12, 13

Terry v. Ohio, 392 U.S. 1 (1968) ..... *passim*

Texas v. Cobb, 532 U.S. 162 (2001) 10

United States v. Burton, 334 F.3d 514 (6th Cir. 2003), cert. denied, 540 U.S. 1135 (2004) 6

United States v. Childs, 277 F.3d 947 (7th Cir.) (*en banc*), cert. denied, 537 U.S. 829 (2002) ..... *passim*

United States v. Garcia, 376 F.3d 648 (7th Cir. 2004) 12

United States v. Hensley, 469 U.S. 221 (1985) 15

United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (*en banc*) 7, 11, 13

United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001), cert. denied, 535 U.S. 948 (2002) 7

United States v. Purcell, 236 F.3d 1274 (11th Cir.), cert. denied, 534 U.S. 830 (2001) 8, 11

United States v. Ramos, 42 F.3d 1160 (8th Cir. 1994), cert. denied, 514 U.S. 1134 (1995) 7

United States v. Shabazz, 993 F.2d 431 (5th Cir. 1993) 6

United States v. Wellman, 185 F.3d 651 (6th Cir. 1999) 11, 13

United States v. $404,905.00 in U.S. Currency, 182 F.3d 643 (8th Cir. 1999), cert. denied sub nom., *Alexander v. United States*, 528 U.S. 1161 (2000) .. 12

Whren v. United States, 517 U.S. 806 (1996) 15

Constitutional Provision:

U.S. Const., amend. IV ..... *passim*

Statute:

28 U.S.C. § 1257(a) 1

Miscellaneous:

Lawrence, *The Scope Of Police Questioning During A Routine Traffic Stop: Do Questions Outside The Scope Of The Original Justification For The Stop Create Impermissible Seizures If They Do Not Prolong The Stop?*, 30 FORDHAM URB. L.J. 1919 (2003) 9

R. STERN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 8

Vazquez, *"Do You Have Any Drugs, Weapons, Or Dead Bodies In Your Car?" What Questions Can A Police Officer Ask During A Traffic Stop*, 76 TUL. L. REV. 211 (2001) 9

PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case.

OPINIONS BELOW

The order of the Supreme Court of Illinois (App. 1a) denying the State's petition for leave to appeal will be reported at ___ Ill. 2d ___, ___ N.E.2d ___ (2004). The order of the Appellate Court of Illinois, Third District (App. 2a-14a), is unreported.

JURISDICTION

The Appellate Court of Illinois entered judgment on May 27, 2004. The Supreme Court of Illinois denied the State's petition for leave to appeal on October 6, 2004. On December 28, 2004, Justice Stevens extended until February 3, 2005, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent was charged with drug offenses and filed a motion to suppress, arguing that the search of her vehicle during a traffic stop violated the Fourth Amendment. The state trial court granted the motion, and the Illinois Appellate Court affirmed. Adhering to settled Illinois precedent, the appellate court held that the police officers exceeded the permissible scope of the traffic stop when they asked respondent whether she had anything illegal in her car.

1. On June 21, 2002, Illinois State Police Officer Brad Sprague was directing traffic at an accident scene. As an SUV passed, the driver honked his horn and indicated that his car had just been hit by another car, a Cavalier. Both vehicles pulled over to the side of the road. While approaching the two vehicles, Sprague noticed that the man whom he had seen driving the Cavalier had moved to the passenger seat. Respondent was in the driver's seat. App. 3a.

Officer Sprague told the previous driver, Zaloudek, to exit the car, and asked him why he had switched places with respondent. Zaloudek eventually admitted that he had been driving during the accident and that his driver's license had been revoked. Zaloudek told Sprague that he had another form of identification in respondent's purse. Sprague told Zaloudek that he was going to be arrested for driving with a revoked license, and asked him to wait while his identity was verified. *Ibid.*

Officer Sprague moved to the driver's side of the car, where he asked respondent for Zaloudek's identification. Respondent looked in her purse but could not find it. Sprague asked for and received permission to look inside respondent's purse, but could not find the identification. Sprague then asked if there was anything illegal in the car. Respondent said "No." *Id.* 3a-4a.

At that point, Officer Sprague received a call from dispatch requesting his status. By that time, Illinois State Police Officer Chad Brody had arrived at the scene with a trained canine, although Sprague had not called for either backup or the canine. Sprague returned to his squad car to radio a report and instructed Brody to monitor Zaloudek. *Id.* 4a.

Officer Brody then approached the Cavalier. Respondent told Brody that she had rented the car. Brody asked for the rental agreement, but respondent could not find it and said that she must have left it at home. Brady asked respondent to look in the car's central console. Respondent did not respond and her hands began to shake. Officer Brody then asked respondent if there was anything in the car he should know about, to which respondent replied "No." Officer Brody then brought his canine to the car, where it alerted to the presence of drugs. The two officers the recovered cocaine and heroin from the center console. *Id.* 4a-5a.

2. After being charged with drug offenses, respondent filed a motion to quash her arrest and suppress evidence on Fourth Amendment grounds. App. 2a. The state trial court granted the motion, reasoning that the officers' questions (regarding whether there was anything illegal in the car) were not supported by reasonable suspicion, and that any suspicion they had about drugs was not reasonably related to the initial purpose of the stop. *Id.* 5a.

3. The Illinois Appellate Court affirmed. App. 2a-14a. The court found that the stop was initially justified by the need to investigate the traffic accident. *Id.* 8a. The court determined that Officer Sprague had probable cause to question Zaloudek about the status of his driver's license and to ask respondent for Zaloudek's identification. *Ibid.* The court found, however, that Sprague violated the Fourth Amendment by asking respondent if there was anything illegal in the car. *Id.* 8a-9a.

In so holding, the court relied on the Illinois Supreme Court's decision in *People v. Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260 (2003). App. 8a. *Gonzalez* sets forth a three-part inquiry, derived from *Terry v. Ohio*, 392 U.S. 1 (1968), to determine whether police questioning during a traffic stop violates the Fourth Amendment. First, the court determines if the question was "reasonably related to the purpose of the stop." If yes, the question was permissible. If not, the court then ascertains whether the officers had "a reasonable, articulable suspicion" to justify the question. If there was reasonable suspicion, the question was permissible. If there was no reasonable suspicion, the court then considers whether the question "impermissibly prolonged the detention or changed the nature of the stop." If yes, a Fourth Amendment violation has occurred, but if not, the question was permissible. *Ibid.*

Applying the *Gonzalez* framework, the appellate court found that Officer Sprague's questions about whether there were illegal materials in the car was "not reasonably related" to the accident investigation. App. 8a-9a. The court further found that the circumstances did not provide Sprague with a reasonable suspicion that respondent possessed drugs. *Id.* 9a. Finally, the court held that Sprague's questions "changed the fundamental nature of the stop," thus violating the Fourth Amendment. *Ibid.*

The court then turned to Officer Brody's questions and reached a similar result: he lacked reasonable suspicion to ask questions unrelated to the accident investigation, and his questions "expanded the scope of this investigation well beyond the initial purpose of the stop" in violation of the Fourth Amendment. App. 9a-11a. For these reasons, the court affirmed the trial court's granting of respondent's motion to suppress. *Id.* 11a.

Justice Schmidt dissented. He concluded that the circumstances created a reasonable suspicion of criminal activity, thus

allowing the officers to expand the scope of their inquiry. App. 11a-14a.

4. The Illinois Supreme Court denied the State's petition for leave to appeal. App. 1a.

REASONS FOR GRANTING THE PETITION

Courts across the Nation have long been deeply split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking questions unrelated to the justification for the stop — such as whether the motorist has contraband in the vehicle. Consistent with settled Illinois Supreme Court precedent, the court below held that the police must have reasonable suspicion that contraband is present before asking such questions. That holding, in addition to reflecting an intractable split among the lower courts, is incorrect. Because mere questioning is not a search or seizure, asking questions during a valid traffic stop does not violate the Fourth Amendment. Put another way, a Fourth Amendment non-event (here, asking the motorist whether there is anything illegal in her car) cannot possibly violate the Fourth Amendment even if conducted during a legitimate traffic stop. See *Illinois v. Caballes*, 543 U.S. ___ (2005).*

This Court should grant certiorari to provide uniformity on this important and recurring question, and also to resolve the closely related matter — itself the subject of a deep and intractable split — of whether *Terry* principles govern police investigatory conduct during a lawful traffic stop justified by

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* The Illinois Appellate Court did not consider whether the canine sniff of respondent's car violated the Fourth Amendment. In any event, because the sniff occurred during the course of the traffic stop, it did not violate the Fourth Amendment. See *Illinois v. Caballes*, 543 U.S. ___ (2005).

probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

I. This Court Should Resolve Whether The Fourth Amendment Prohibits Police, During a Lawful Traffic Stop, From Asking The Motorist Questions Unrelated To The Traffic Violation That Justified The Stop.

A. The Lower Courts Are Deeply and Intractably Split on the Question Presented.

Before the court below decided this case, numerous state courts of last resort and federal courts of appeals had considered the extent to which (if any) the Fourth Amendment prohibits police from asking a lawfully seized motorist questions unrelated to the traffic violation that justified the traffic stop. This issue most often arises when the officer asks the motorist whether there is any contraband (drugs or guns) in the vehicle. The lower courts have reached conflicting results and remain hopelessly deadlocked.

At one end of the spectrum, some courts have held that a police officer who makes a probable cause-based traffic stop needs no independent justification to ask the motorist whether there is any contraband in the vehicle. See *State v. Akuba*, 686 N.W.2d 406, 415-417 (S.D. 2004); *United States v. Burton*, 334 F.3d 514, 518-519 (6th Cir. 2003), cert. denied, 540 U.S. 1135 (2004); *United States v. Childs*, 277 F.3d 947, 950-954 (7th Cir.) (*en banc*), cert. denied, 537 U.S. 829 (2002); *State v. Middleton*, 43 S.W.3d 881, 885 (Mo. App. 2001); *State v. Parkinson*, 135 Idaho 357, 362-363, 17 P.3d 301, 306-307 (App. 2000); *State v. Gaulrapp*, 207 Wis. 2d 600, 606-609, 558 N.W.2d 696, 699-700 (App. 1996), rev. denied, 208 Wis. 2d 213, 562 N.W.2d 603 (1997); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993).

At the opposite end of the spectrum, other courts have held that the Fourth Amendment prohibits an officer from asking the motorist about contraband unless the officer has reasonable suspicion that contraband is present. See *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (*en banc*); *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001), cert. denied, 535 U.S. 948 (2002); *State v. Gibbons*, 248 Ga. App. 859, 863-864, 547 S.E.2d 679, 682 (2001); *State v. Taylor*, 126 N.M. 569, 575-577, 973 P.2d 246, 252-254 (App. 1998), cert. denied, 126 N.M. 534, 972 P.2d 353 (1999); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), cert. denied, 514 U.S. 1134 (1995).

Still other courts, including the Illinois state courts, have adopted an intermediate approach, which asks whether the officer's question "impermissibly prolonged the [traffic stop] or changed the fundamental nature of the stop." *People v. Gonzalez*, 204 Ill. 2d 220, 235, 789 N.E.2d 260, 270 (2003) (citing *Holt*, 264 F.3d at 1240 (Murphy, J., concurring in part and dissenting in part)); accord, *State v. McKinnon-Andrews*, 151 N.H. 19, 846 A.2d 1198, 1202-1203 (2004) (adopting *Gonzalez* approach). The court below followed this intermediate approach. App. 8a (citing *Gonzalez*).

This conflict is intolerable, particularly in Illinois, where the outcome of particular cases depends entirely upon whether a crime is prosecuted in state or federal court. The Seventh Circuit in *Childs*, sitting *en banc*, held that the Fourth Amendment does not require police officers to have reasonable suspicion that contraband is present before asking motorists about contraband during a traffic stop. See 277 F.3d at 950-954. Just over a year later, the Illinois Supreme Court in *Gonzalez* expressly rejected *Childs*, holding that Illinois state courts would impose more stringent Fourth Amendment limits on such questioning. See 204 Ill. 2d at 229-235, 789 N.E.2d at 266-270.

Thus, had this case been commenced, not by the State of Illinois in the Circuit Court of Grundy County, but by the United States in the District Court for the Northern District of Illinois, the Fourth Amendment analysis would have been governed by the Seventh Circuit's *en banc* opinion in *Childs*, not by the Illinois Supreme Court's opinion in *Gonzalez*, and respondent's suppression motion would have been denied, not granted. Compare *Childs*, 277 F.3d at 950-954 (holding that police questioning unrelated to purpose of traffic stop does not violate Fourth Amendment), with App. 8a-11a (applying *Gonzalez* and holding that police questioning unrelated to purpose of traffic stop violates Fourth Amendment); *People v. Leigh*, 341 Ill. App. 3d 492, 496-497, 792 N.E.2d 809, 812-813 (2003) (same); *People v. Lomas*, 349 Ill. App. 3d 462, 469-471, 812 N.E.2d 39, 44-46 (2004) (same). The fact that the outcome of Fourth Amendment challenges in this context depends upon whether the case proceeds in federal or state court presents a textbook example of a certworthy split. See R. STERN, ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

The lower courts themselves have recognized that they are deeply divided over whether and, if so, to what extent the Fourth Amendment limits police questioning at traffic stops about contraband (or other matters unrelated to the traffic violation that justified the stop). See, *e.g.*, *McKinnon-Andrews*, 846 A.2d at 1202-1203 (recognizing split and choosing sides); *Gonzalez*, 204 Ill. 2d at 228-235, 789 N.E.2d at 266-270 (same); *Childs*, 277 F.3d at 951-954 (same); see also *United States v. Purcell*, 236 F.3d 1274, 1279-1280 (11th Cir.) (recognizing split, but not choosing sides), cert. denied, 534 U.S. 830 (2001); *Lockett v. State*, 747 N.E.2d 539, 542-543 (Ind. 2001) (same). Commentators likewise have recognized the impor-

tance of the issue and the split of authority. See Lawrence, *The Scope Of Police Questioning During A Routine Traffic Stop: Do Questions Outside The Scope Of The Original Justification For The Stop Create Impermissible Seizures If They Do Not Prolong The Stop?*, 30 FORDHAM URB. L.J. 1919, 1920 (2003) (issue arises "frequently"); Vazquez, *"Do You Have Any Drugs, Weapons, Or Dead Bodies In Your Car?" What Questions Can A Police Officer Ask During A Traffic Stop*, 76 TUL. L. REV. 211 (2001).

In sum, the conflict over whether and, if so, to what extent the Fourth Amendment prohibits police officers at lawful traffic stops from asking questions unrelated to the traffic violation that justified the stop is important, deep, intractable, and ripe for consideration. This case, which exemplifies and implements the position taken by the Illinois state courts, presents an ideal vehicle for the Court to resolve that question.

B. The Fourth Amendment Does Not Require Police To Have Reasonable Suspicion That Contraband Is Present Before Asking Questions About Contraband During A Traffic Stop.

The Fourth Amendment requires that every search or seizure be "reasonable," which typically requires "individualized suspicion of wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). This Court, however, has long recognized that "mere police questioning does not constitute a seizure," and therefore may be undertaken without individualized suspicion. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Thus, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen." *Ibid.*

When a motorist is temporarily seized at a traffic stop, mere questioning does not effect an incremental search or seizure, and therefore does not violate the Fourth Amendment. See *Childs*, 277 F.3d at 951. A contrary conclusion would lead to an anomaly — officers could not ask motorists detained at a traffic stop questions unrelated to the violation that prompted the stop, but could ask any questions of persons not in custody, see *Bostick*, 501 U.S. at 434, and questions unrelated to the charged offense of persons in formal custody, see *Texas v. Cobb*, 532 U.S. 162 (2001). Nothing in this Court's precedents supports such a distinction.

This Court's recent decision in *Illinois v. Caballes*, *supra*, confirms the point. *Caballes* considered whether the Fourth Amendment requires reasonable suspicion to justify using a drug-detection dog to sniff the exterior of a vehicle during a lawful traffic stop. *Id.*, slip op. at 2. The Court held that no reasonable suspicion was required, explaining that because the dog sniff did not "infringe[] [the motorist's] constitutionally protected interest in privacy," the sniff did not "change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Id.*, slip op. at 3. Because the officers did not extend the duration of the traffic stop to facilitate the dog sniff, *id.*, slip op. at 2-3, the Court ruled that no Fourth Amendment violation had occurred, *id.*, slip op. at 5.

Like the dog sniff in *Caballes*, the officers' questions of respondent did not constitute an independent search or seizure and therefore did not infringe her constitutionally protected privacy interests. See *Bostick*, 501 U.S. at 435. And as in *Caballes*, the state court in this case did not find that the officers extended the duration of the stop to facilitate their questioning. App. 9a. Accordingly, the officers' questions did not violate the Fourth Amendment.

II. This Court Should Resolve Whether The *Terry* Doctrine Governs Police Investigatory Conduct During A Lawful Traffic Stop Justified By Probable Cause, Where The Investigatory Conduct Is Unrelated To The Traffic Violation That Justified The Stop.

The conflict over the Fourth Amendment validity of questioning motorists about matters unrelated to the violation that justified the traffic stop reflects, and in large measure mirrors, a deeper methodological split over whether the *Terry* doctrine governs police investigatory conduct during a lawful traffic stop justified by probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop. This split provides an independent ground for granting certiorari.

The Illinois Appellate Court's analysis in this case adheres to a long line of Illinois precedent that uses *Terry* to evaluate the validity of unrelated police investigatory conduct at probable cause-based traffic stops. See *People v. Caballes*, 207 Ill. 2d 504, 508-509, 802 N.E.2d 202, 204 (2003), rev'd sub. nom, *Illinois v. Caballes*, 543 U.S. ___ (2005); *People v. Harris*, 207 Ill. 2d 515, 522-524, 802 N.E.2d 219, 225 (2003), pet. for cert. pending, No. 03-1224; *People v. Bunch*, 207 Ill. 2d 7, 13-14, 796 N.E.2d 1024, 1029 (2003), cert. denied, 124 S. Ct. 1712 (2004); *Gonzalez*, 204 Ill. 2d at 228, 789 N.E.2d at 266 (declining to "distinguish between those cases in which the traffic stop is based on *Terry*'s 'articulable suspicion' and those cases in which the traffic stop is supported by probable cause," and holding that "*Terry* principles apply even in the presence of probable cause"); *People v. Gonzalez*, 184 Ill. 2d 402, 420-422, 704 N.E.2d 375, 384 (1998), cert. denied, 528 U.S. 825 (1999).

Several other state and federal courts use the same approach. See, *e.g.*, *Barch v. State*, 92 P.3d 828, 831-832 (Wyo. 2004); *Holt*, 264 F.3d at 1230; *Purcell*, 236 F.3d at 1277; *United States v. Wellman*, 185 F.3d 651, 655-656 (6th Cir.

1999); *State v. Dickey*, 152 N.J. 468, 476, 706 A.2d 180, 184 (1998). See also *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003) (holding, without express reference to *Terry*, that "an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship" during seizure incident to executing search warrant on a home) (emphasis in original), cert. granted sub nom., *Muehler v. Mena*, 124 S. Ct. 2842 (2004).

Other courts, including the Seventh Circuit, have expressly rejected the view that the *Terry* doctrine governs unrelated investigatory conduct that occurs during a traffic stop justified by probable cause. See, *e.g.*, *United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) ("it is inappropriate to treat investigations following traffic stops as governed by *Terry*, when the stop rests on probable cause to believe that an offense has been committed"); *Childs*, 277 F.3d at 952-954; *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (refusing to apply *Terry* doctrine to traffic stop predicated on probable cause: "A traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated."), cert. denied sub nom., *Alexander v. United States*, 528 U.S. 1161 (2000).

Two recent decisions from the Minnesota Supreme Court reflect the ongoing confusion in this area of the law. Three years ago, Minnesota aligned itself with those jurisdictions holding that "*Terry* principles are appropriately applied * * * when a motor vehicle is stopped for a routine equipment violation." *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002). The Minnesota court (*id.* at 134) did so on the strength of *Berkemer v. McCarty*, 468 U.S. 420 (1984). The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" under *Miranda*. *Id.* at 423. In the course of ruling that such

motorists are not "in custody" for *Miranda* purposes, *Berkemer* observed that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted). Based upon this language, the Minnesota court concluded that *Terry* governs police action at all traffic stops. *Wiegand*, 645 N.W.2d at 133-134. Accord, *e.g.*, *Wellman*, 185 F.3d at 656 (citing *Berkemer* for the same proposition); *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384 (same).

The Minnesota Supreme Court revisited this issue in *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004). *Askerooth* presented typical facts — the defendant was pulled over for committing a traffic violation; events during the stop revealed that the defendant possessed illegal drugs; and the defendant unsuccessfully moved to suppress the drugs on the ground that the officer's actions violated the Fourth Amendment. *Id.* at 356-359. The Minnesota court recognized that its prior decision in *Wiegand*, as well the Illinois Supreme Court's decision in *Gonzalez* and the Tenth Circuit's *en banc* decision in *Holt*, had held that "the *Terry* analysis applies *irrespective* of whether a stop for a minor traffic offense is based on reasonable suspicion or supported by probable cause." *Id.* at 360 (emphasis in original).

Two considerations, however, prompted the Minnesota court to reconsider that holding. First, the court recognized that *Berkemer* had qualified the analogy it had drawn between traffic stops and *Terry* stops:

> "[n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."

Id. at 360 (quoting *Berkemer*, 468 U.S. at 439 n.29). This qualification, the Minnesota court suggested, cast doubt on whether the *Terry* doctrine governs investigatory conduct at traffic stops justified by probable cause. *Ibid.* Accord, *Childs*, 277 F.3d at 953 ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29).

Second, the Minnesota court noted that "[w]hether *Terry* can still be applied to traffic stops supported by probable cause is uncertain in light of" *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). *Askerooth*, 681 N.W.2d at 360. *Atwater* held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. The Minnesota court interpreted *Atwater* as "remov[ing] Fourth Amendment reasonableness limitations from even a 'very minor' traffic stop when the stop is supported by probable cause." *Askerooth*, 681 N.W.2d at 361 (quoting *Atwater*, 532 U.S. at 354). Given its view of *Atwater*, and citing the Seventh Circuit's *en banc* decision in *Childs*, the Minnesota court declared itself "uncertain that *Terry* principles still apply to a court's determination whether a seizure during such a traffic stop can be unreasonable under the Fourth Amendment." *Ibid.*

There are other reasons, not cited by the Minnesota Supreme Court in *Askerooth*, to conclude that *Terry* does not govern unrelated investigatory conduct at traffic stops supported by probable cause. The *Terry* doctrine requires that *Terry* stops — which need only be justified by reasonable suspicion — have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 124 S. Ct. 2451, 2458 (2004). By contrast, as *Atwater* teaches, if there is probable cause to believe that a driver has committed a minor

traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354; see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a traffic stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985); see also *Hiibel*, 124 S. Ct. at 2459-2460. As this Court has made clear, such fact-specific balancing is inappropriate when determining the validity of traffic stops supported by probable cause and of police conduct at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren v. United States*, 517 U.S. 806, 817-819 (1996); see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

Again, the point is confirmed by *Caballes*. The Illinois Supreme Court in *Caballes* applied *Terry* to evaluate the Fourth Amendment validity of a canine sniff that occurred during a probable cause-based traffic stop. See *Caballes*, slip op. at 1-2 (Ginsburg, J., dissenting) (citing *Caballes*, 207 Ill. 2d at 508, 802 N.E.2d at 204). Justice Ginsburg would have adopted the *Terry* approach, see *id.*, slip op. at 3-5 (citing, *e.g.*, *Berkemer v. McCarty*, *supra*), but recognized that the Court had "implicitly" rejected that approach, *id.*, slip op. at 4.

As Justice Ginsburg correctly ascertained, the Court's analysis in *Caballes* rejected *Terry*, and instead rested upon the following principle — when a motorist is properly seized at a lawful traffic stop, the officer may conduct additional investigatory activities during the stop so long as those activities do not effect an incremental search or seizure. The Court should take the opportunity in this case to make explicit what is apparent, albeit implicit, in *Caballes*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, because the Illinois Appellate Court's opinion is fundamentally incompatible with the principles set forth in *Illinois v. Caballes*, *supra*, the judgment below should be vacated and remanded for reconsideration in light of *Caballes*.

Respectfully submitted.

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FEBRUARY 2004

Supreme Court of Illinois

No. 98719

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v.
MICHELLE L. BARTELS, Appellee.

October 6, 2004

Disposition of Petitions for Leave to Appeal

Denied.

No. 3–03–0565

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2004

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit,
Plaintiff-Appellant,	)	Grundy County, Illinois
v.	)	No. 02 CF 86-2
MICHELLE L. BARTELS,	)	Honorable Robert C. Marsaglia,
Defendant-Appellee.	)	Judge Presiding

ORDER "Not To Be Published"
[May 27, 2004]

The defendant, Michelle L. Bartels, was charged with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2002)) and unlawful possession of a controlled substance (cocaine and heroin) (720 ILCS 570/402(a)(2)(A), 402(c) (West 2002)). She filed a motion to quash the arrest and suppress the evidence alleging that the search of the vehicle was unlawful. The trial court granted the motion, and the State appeals. We affirm.

I. FACTS

At the hearing, Illinois State Police Officer Brad Sprague testified that on June 21, 2002, at approximately 9 p.m., he was controlling traffic for an accident that had occurred on Interstate 80. A Chevrolet Suburban approached the scene. As the vehicle passed Officer Sprague, the driver honked and indicated that his vehicle had just been struck by the defendant's car, a Cavalier. Officer Sprague did not instruct either vehicle to stop.

Approximately one-quarter mile down the interstate, both vehicles pulled over to the shoulder. Officer Sprague left his position and drove to the scene. He stopped his vehicle, activated the emergency lights and exited the car. Sprague testified that at that point, no one was free to leave until he completed his investigation of the accident. As he approached the Cavalier, he noticed that the defendant was seated in the driver's seat and Zaloudek was sitting in the passenger's seat. Sprague testified that when the Cavalier passed him on the interstate Zaloudek was driving.

After asking Zaloudek to exit the car, Sprague asked why he had switched seats with the defendant. Zaloudek initially denied switching but then admitted that he had driving the Cavalier when the accident occurred. Officer Sprague asked Zaloudek if he had a driver's license. He replied that he did not. When asked if it had been suspended or revoked, Zaloudek replied that it had been revoked. Sprague asked for another form of identification. Zaloudek said that it was in the defendant's purse. Officer Sprague told Zaloudek he was going to be arrested for driving on a revoked license and asked him to sit down while he tried to verify his identification information.

Officer Sprague approached the driver's side of the vehicle and told the defendant that he needed to see Zaloudek's identification. The defendant looked in her purse but could not find it. Spargue testified that the defendant was acting "ex-

tremely nervous." Sprague asked for permission to look inside the purse, and the defendant agreed. Sprague did not find Zaloudek's identification. Sprague testified that at that point he believed he was dealing with something more than just a traffic accident. He asked the defendant if there was anything illegal in the car. She responded, "No." Sprague asked the defendant who was driving the vehicle when the accident occurred. The defendant stated that Zaloudek was driving the car. Sprague then asked for and received consent to search the vehicle. Sprague testified that he asked for consent because (1) the defendant and Zaloudek had switched positions, (2) Zaloudek was driving on a revoked license and was unable to produce an alternative form of identification, and (3) the defendant was nervous.

At that point, the officer received a call from dispatch requesting his status. State Police Officer Chad Brody had arrived at the scene earlier with his trained canine. Sprague was uncertain when Brody had arrived and testified that he had not called for backup or the dog. Officer Sprague returned to his squad car and instructed Brody to watch Zaloudek.

Brody testified that he was not involved in Sprague's investigation of the incident. He was there for safety purposes only and was instructed to stay with Zaloudek. After Sprague returned to his car, Brody approached the Cavalier and asked the defendant why she had moved into the driver's seat. While talking to the defendant, he used a flashlight to search the interior of the vehicle and found no contraband in plain view. The defendant indicated to Brody that she had rented the Cavalier. Brody asked for the rental agreement. The defendant looked in the glove compartment but could not find it. She then looked around inside the vehicle and informed the officer that she must have left it at home. Officer Brody asked her to look in the center console. The defendant did not respond and her hands began to shake. Brody testified that based on her nervous

behavior and her refusal to look in the console, he believed there were drugs in the console. He asked if there was anything in the car that he should know about. The defendant replied, "No." He then asked for and received permission to search the vehicle. The canine indicated for the presence of drugs, and the officers recovered cocaine and heroin in the console.

The defendant testified that she was asleep when Zaloudek hit the Suburban. She admitted that he was driving the rental car with her permission and that she knew he was unauthorized to drive. She testified that, upon Sprague's request, she looked in her purse for Zaloudek's identification but found nothing. She gave Officer Sprague permission to look as well. After Sprague left, another officer approached the vehicle and asked to whom the car belonged. She said that she had rented the car. The officer asked for the rental agreement, but she could not find it. He then asked her to look in the console. She declined and told him that she knew she had left the papers at home. Brody told her that if she did not look in the console, "he was going to go get his dog." She replied, "Go ahead, do whatever." She testified that neither officer asked for consent or permission to search the vehicle.

The trial court granted the defendant's motion. The court concluded that the officers' questions were not supported by any independent reasonable and articulable suspicion, and that any drug suspicion was not reasonably related to their initial contact with the defendant.

II. ANALYSIS

On appeal, the State argues that the trial court erred in quashing the arrest and suppressing the evidence. The State first argues that Officer Sprague did not "stop" the defendant within the meaning of the fourth amendment. Therefore, the State contends the constitutional rules did not apply to the encounter. In the alternative, the State maintains that the

officers' questions did not violate the defendant's fourth amendment rights because the officers had a reasonable, articulable suspicion of criminal activity.

The ruling of a trial court on a motion to quash arrest and suppress evidence frequently presents mixed questions of fact and of law. Because the trier of fact is in the best position to review the evidence and weigh the credibility of the witnesses, the findings of fact of the trial court will not be disturbed unless they are manifestly erroneous. *People v. Simac*, 321 Ill. App. 3d 1001, 748 N.E.2d 798 (2001). However, on questions of law, the finding of the trial court is subject to *de novo* review. *Simac*, 321 Ill. App. 3d 1001, 748 N.E.2d 798.

A. The Stop

The State argues that the encounter between the defendant and Sprague was not a stop but was instead a voluntary encounter that fell within the officer's community caretaking function. We reject the State's contention.

There are three recognized tiers of the police-citizen encounters: (1) an arrest; (2) a *Terry* stop; and (3) a "community caretaking" function. *People v. Murray*, 137 Ill. 2d 382, 560 N.E.2d 309 (1990). An arrest and a *Terry* stop must survive fourth amendment scrutiny. *Murray*, 137 Ill. 2d 382, 560 N.E.2d 309. Thus, the police may question a citizen without triggering fourth amendment protections during a community caretaking encounter, so long as the officer does not convey by use of force or a show of authority that compliance with his inquiry is required. *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991). This function is totally divorced from the detection or investigation of evidence of a violation of a criminal statute. *City of Highland Park v. Lee*, 291 Ill. App. 3d 48, 683 N.E.2d 962 (1997); see also *People v. Harris*, 207 Ill. 2d 515, 802 N.E.2d 219 (2003). A person is seized within the meaning of the fourth amendment if,

in view of all the circumstances, a reasonable person in his position would not believe that he is free to leave. *People v. Brownlee*, 186 Ill. 2d 501, 713 N.E.2d 556 (1999).

Here, Zaloudek pulled the Cavalier over after the driver of the vehicle he hit informed Officer Sprague that an accident had occurred. Officer Sprague arrived at the scene moments later, activated his lights, and exited his vehicle. His purpose for the stop was to investigate an accident and complete an accident report. Officer Sprague testified that once he began his investigation, no one was free to leave. Zaloudek was asked to step out of the car and was told to sit down while Officer Sprague spoke to the defendant. Officer Brody and his trained canine were also present. Certainly, a reasonable person in the defendant's position would not have felt free to leave. The defendant was detained and her compliance was compelled. Therefore, Officer Sprague's encounter with the defendant does not qualify as "community caretaking."

B. Search of the Vehicle

Next, the State insists that even if we conclude a "stop" occurred, the officers' questions did not violate the defendant's fourth amendment rights because the officers had a reasonable, articulable suspicion of criminal activity. We conclude that the officers' questions impermissibly expanded the scope of the traffic stop.

The fourth amendment of the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. This provision applies to all seizures of the persons, including those of only a brief detention short of an arrest. *United States v. Brignoni-Ponce*, 442 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975). Routine traffic stops fall within that category. *People v. Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260 (2003).

Based on their brevity, traffic stops are analyzed by applying the rule set forth in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Under *Terry*, a police officer may briefly detain a person for questioning if the officer reasonable believes that the person has committed, or is about to commit, a crime. The reasonableness of the officer's actions involves a two-part inquiry: (1) whether the stop was justified at its inception; and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260 (citing *Terry*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868).

In *Gonzalez*, the Illinois Supreme Court developed a three-tiered test for determining whether police questioning during a traffic stop satisfies the *Terry* scope requirement. First, no fourth amendment violation occurs if the question is reasonably related to the purpose of the stop. However, if the question is not reasonably related, the officer must then have had a reasonable, articulable suspicion that would justify the question. If he had a reasonable, articulable suspicion, no constitutional violation occurred. If he did not, the final consideration is whether the inquiry impermissibly prolonged the detention or changed the nature of the stop. If the inquiry did, the officer's actions violated the defendant's fourth amendment rights. If the inquiry did not, no fourth amendment violation occurred. *Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260.

In this case, the stop was clearly justified at its inception. Officer Sprague's initial purpose for the stop was to investigate a minor traffic accident. Sprague questioned Zaloudek regarding the status of his driver's license and searched the defendant's purse for Zaloudek's identification. However, he then launched a broad inquiry into the contents of the vehicle which had no direct relation to the initial justification for the stop.

Under *Gonzalez*, an investigatory inquiry does not violate the defendant's fourth amendment rights if the officer has a

reasonable, articulable suspicion of criminal activity. *Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260. Here, Sprague had no reasonable, articulable suspicion of illegal drug use or the possession of drugs. Sprague testified that the defendant was nervous and his suspicions were aroused because the defendant had switched seats with the passenger. However, Zaloudek had just informed Officer Sprague that he had been driving the vehicle when the accident occurred and that his license was revoked. Sprague's unparticularized suspicion that the vehicle contained and illegal substance is not enough to justify broadening the scope of the stop into a drug investigation. See *People v. Thomas*, 198 Ill. 2d 103, 759 N.E.2d 899 (2001) (mere hunches or unparticularized suspicious are not enough to justify broadening a stop into an investigatory detention). Given the circumstances, the defendant's conduct did not create a reasonable, articulate suspicion that the vehicle contained contraband.

In the absence of a reasonable, articulate suspicion, we must consider whether Officer Sprague's questions impermissibly prolonged the detention or changed the fundamental nature of the stop. We determine that they did. Regardless of the length of the detention, asking the defendant if she had anything illegal in the car went well beyond the initial purpose of Sprague's investigation.

Under the unusual circumstances of this case, our analysis does not end with Officer Sprague. Because the investigation was still in progress and had yet to be completed, we must apply the *Gonzalez* test to Officer Brody's questions as well. As previously stated, the investigation was justified at its inception. The questions we must answer are: (1) whether Brody had a reasonable, articulable suspicion of criminal activity, and, if not, (2) whether his inquiry impermissibly prolonged the detention or changed the fundament nature of the stop.

We first concluded that Brody had no reasonable, articulable suspicion that drugs were in the vehicle. The record demonstrates that when Officer Sprague returned to his squad car, he specifically instructed Brody to stay with Zaloudek. He did not. Instead, he proceeded to question the defendant without any specific knowledge of Sprague's investigation. Brody testified that the defendant was nervous and shaky, was unable to produce the vehicle's rental agreement, and refused to look in the console. However, these factors do not give rise to a reasonable suspicion that the vehicle contained drugs. *People v. Penny*, 188 Ill. App. 3d 499, 544 N.E.2d 1015 (1989) (nervousness and shaking hands are generally not characteristics that invoke reasonable suspicion, particularly when one is detained by a police officer); *People v. Sinclair*, 281 Ill. App. 3d 131, 666 N.E.2d 1221 (1996) and *Nebraska v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000) (exercising one's right to decline permission to search cannot be used to support reasonable suspicion or probable cause). Brody testified that during his conversation with the defendant, he found no contraband in plain view of the interior of the vehicle. Further, the record does not indicate that he smelled drugs, noticed drug paraphernalia, or observed any unusual drug-related behavior by the defendant. Based on his observations, Officer Brody had no reasonable, articulable suspicion to justify a search of the vehicle.

Finally, we must consider whether Brody's inquiry impermissibly extended the duration of the stop or changed its fundamental nature. See *Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260. Contrary to the simple request for identification in *Gonzalez*, Officer Brody's question expanded the scope of this investigation well beyond the initial purpose of the stop. As the State notes, the whole purpose of the stop was to investigate a traffic accident and complete an accident report. Questioning the defendant as to the vehicle's contents and her possession of contraband had no correlation to the traffic accident. Further,

Officer Brody's continued questioning and his threats of a canine search increased the confrontational tenor of the stop and significantly changed the nature of the investigation. See *People v. Leigh*, 341 Ill. App. 3d 492, 792 N.E.2d 809 (2003) (asking defendant if vehicle contained anything that dog would alert to increased confrontational nature of stop). Accordingly, the trial court did not err in granting the defendant's motion to quash the arrest and suppress the evidence.

III. CONCLUSION

The judgment of the circuit court of Grundy County is affirmed.

Affirmed.

O'BRIEN, J. with LYTTON, J., concurring. SCHMIDT, J., dissenting.

JUSTICE SCHMIDT, dissenting:

I dissent.

In reaching its conclusion, the majority attempts to classify this encounter as a routine traffic stop, which it clearly was not. The majority's reliance on *Gonzalez* is misplaced. It was not the police who expanded the nature of this encounter, it was the defendant and her passenger. From the moment that Trooper Sprague arrived on the scene and realized that the driver and passenger had switched positions, this was no longer a routine traffic accident investigation.

To begin with, Zaloudek says that he and defendant switched seats because Zaloudek did not have a valid driver's license and therefore did not want to be arrested for that charge. That is certainly one reason to switch seats and avoid a police

encounter. There is a laundry list of other potential reasons to avoid a police encounter such as being wanted on arrest warrants for everything from domestic battery to murder or kidnaping. The majority concludes that once Zaloudek gave a plausible answer for his switching seats, the police were obligated to accept it and to stop any additional investigation. I disagree. Even assuming that Zaloudek's explanation was the correct one, I believe that from the very outset, the police had probable cause to arrest Zaloudek and defendant for obstructing justice. 760 ILCS 5/31 -- 4 (a) (West 2000). Clearly, the defendant participated in switching seats to help Zaloudek avoid arrest and prosecution.

Zaloudek had no identification on his person. He told Trooper Sprague it was in the defendant's purse. It was not. When asked about the co-defendant's identification, defendant Bartels was acting "real nervous." At that time, Trooper Sprague believed that he had "something more than an accident" and that Zaloudek had not given his correct name.

At the time of the search of this car, Zaloudek had produced no identification. Defendant agreed to look in her purse, glove box and about the car, but refused to look in the console to look for either Zaloudek's identification or papers related to the rental of the vehicle.

Under the circumstances, police officers had a reasonable, articulable suspicion of criminal activity. In my opinion, especially in light of the fact that Zaloudek had not yet been identified, the switching of the seats and the unusual behavior by defendant Bartels, a search of the car incidence to the arrest was reasonable, if only to look for the identification which Zaloudek said defendant possessed. Additionally, defendant said the rental papers for the car were in the car and looked about the car and the glove box; when they weren't there, she changed her mind and said the papers must be at home, and refused to look any further in the car, including the console

which was right next to her. However, most importantly, defendant consented to the search.

The majority draws a conclusion that somehow this was a drug investigation which originated from a routine traffic stop without any reasonable suspicion. While ultimately drugs were found, this was not a drug investigation, but rather a reasonable investigation based on the illegal conduct and deceptive behavior of the two occupants of a vehicle. The majority focuses on defendant's nervous behavior and ignores that totality of the circumstances. Would the ruling be the same had a body been found in the back of the vehicle?

The effect of the majority decision is that the police now have to accept any explanation for criminal conduct which might sound plausible to a judge. There were many unanswered questions. Unlike the majority, I find no constitutional barrier to the police asking legitimate questions under the circumstances that existed here.

In conclusion, if the scope of this stop was expanded, it was expanded, not by the police, but by the occupants of the vehicle. The police investigation and search were entirely reasonable under the circumstances. This would be true even without consent by defendant. Defendant's consent to the search was valid. "The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Florida v. Bostick*, 501 U.S. 429, 439 115 L. Ed. 389, 401, 111 S. Ct. 2382, 2389 (1991). The defendant had already consented to a police search of the vehicle before Trooper Brody asked his first question.

This case would have been a lot simpler had the troopers simply informed the defendant that she was under arrest for obstructing justice. There was clearly probable cause to do so. Then the police could have performed an inventory search of the vehicle subject to the arrest of the original driver, Zaloudek.

Remember, although Bartels switched seats, she never established that she was actually the person who rented the vehicle and had the right to possess it. In short, there are numerous theories under which the search was proper, not the least of which is consent.

I would reverse the judgment of the trial court.

JUN 10 2005

No. 04-1066

IN THE

Supreme Court of the United States

Illinois,

Petitioner,

v.

Michelle L. Bartels.

On Petition for a Writ of Certiorari
to the Appellate Court of Illinois

BRIEF IN OPPOSITION TO CERTIORARI

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June 10, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Illinois trial and intermediate appellate courts correctly held, on the distinctive facts of this case, that police officers' search of a vehicle that had pulled over voluntarily after a traffic accident was undertaken without any reasonable suspicion and thus violated the Fourth Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT 1
REASONS FOR DENYING THE WRIT 8
I. The State of the Record in This Case Threatens to Prevent the Court from Even Reaching the Question Presented. 10
II. There Is No Actual Conflict Among the Lower Courts on the First Question Presented That Requires This Court's Intervention. 20
III. Petitioner's Second Question Presented Provides No Additional Claims That Warrant This Court's Review. 25
CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Arkansas v. *Sullivan*, 532 U.S. 769 (2001) 15
Barch v. *State*, 92 P.3d 828 (Wyo. 2004) 27, 28
Cady v. *Dombrowski*, 413 U.S. 433 (1973) 11
Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 2
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987) 12
Hiibel v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451 (2004) 17
Illinois v. *Bunch*, 541 U.S. 959 (2004) 2, 8
Illinois v. *Caballes*, 125 S. Ct. 834 (2005) 28
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984) 12
Medellin v. *Dretke*, No. 04-5928, slip op. (May 23, 2005) .. 11
Mena v. *City of Simi Valley*, 332 F.3d 1255 (CA9 2003), *vacated and remanded sub nom. Muehler* v. *Mena*, 125 S. Ct. 29 (2004) 27
Ohio v. *Robinette*, 519 U.S. 33 (1996) 15
Ornelas v. *United States*, 517 U.S. 690 (1996) 16
People v. *Gonzalez*, 789 N.E.2d 260 (Ill. 2003) ..... passim
People v. *Leigh*, 792 N.E.2d 809 (Ill. App. Ct. 2003) 24
People v. *Lomas*, 812 N.E.2d 39 (Ill. App. Ct. 2004) 24
People v. *Vance*, 390 N.E.2d 867 (Ill. 1979) 9
State v. *Akuba*, 686 N.W.2d 406 (S.D. 2004) 13, 21, 24
State v. *Askerooth*, 681 N.W.2d 353 (Minn. 2004) 28
State v. *Dickey*, 706 A.2d 180 (N.J. 1998) 27
State v. *Gaulrapp*, 558 N.W.2d 696 (Wis. Ct. App. 1996) .. 20
State v. *Gibbons*, 547 S.E.2d 679 (Ga. Ct. App. 2001) 20
State v. *McKinnon-Andrews*, 846 A.2d 1198 (N.H. 2004) 13, 21, 22
State v. *Middleton*, 43 S.W.3d 881 (Mo. Ct. App. 2001) 20
State v. *Parkinson*, 17 P.3d 301 (Idaho Ct. App. 2000) 20
State v. *Taylor*, 973 P.2d 246 (N.M. Ct. App. 1998) 20
Sullivan v. *Edward Hosp.*, 806 N.E.2d 645 (Ill. 2004) 1

Terry v. *Ohio*, 392 U.S. 1 (1968) ..... passim
United States v. *$404,905.00 in U.S. Currency*, 182 F.3d 643 (CA8 1999) 28
United States v. *Burton*, 334 F.3d 514 (CA6 2003), *cert. denied*, 540 U.S. 1135 (2004) 13, 21, 23
United States v. *Childs*, 277 F.3d 947, 952 (CA7), *cert. denied*, 537 U.S. 829 (2002) ..... passim
United States v. *Garcia*, 376 F.3d 648 (CA7 2004) 27
United States v. *Holt*, 264 F.3d 1215 (CA10 2001) (en banc) 13, 21, 23
United States v. *Murillo*, 255 F.3d 1169 (CA9 2001), *cert. denied*, 535 U.S. 948 (2002) 21, 22
United States v. *Purcell*, 236 F.3d 1274 (CA11 2001) ... 27, 28
United States v. *Ramos*, 42 F.3d 1160 (CA8 1994), *cert. denied*, 514 U.S. 1134 (1995) 13, 18, 21, 22
United States v. *Shabazz*, 993 F.2d 431 (CA5 1993) 13, 21, 24
United States v. *Wellman*, 185 F.3d 651 (CA6 1999) 27
United States v. *Williams*, 535 U.S. 1019 (2002) 2, 9
Whren v. *United States*, 517 U.S. 806 (1996) 15

Statutes

625 ILL. COMP. STAT. 5/6-303 (2005) 4

Other Authorities

Brief for the United States in Opposition, *United States* v. *Childs*, 277 F.3d 947 (CA7), *cert. denied*, 537 U.S. 829 (2002) (No. 01-9795) 9, 20, 23
ILL. SUP. CT. R. 23(e) 9
Order of Circuit Court, *People* v. *Zaloudek*, No. 2002-CF-86-1, 2002-CF-86-2 (July 3, 2003) ..... passim
Pet. for a Writ of Cert., *Illinois* v. *Bunch*, 796 N.E.2d 1024 (Ill. 2003), *cert. denied*, 541 U.S. 959 (2004) (No. 03-774) 9

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 10, 20, 22
SUP. CT. R. 10(a) 20
SUP. CT. R. 10(b) 20
Transcript of Motion to Suppress, *People* v. *Bartels*, No. 02 CF 86-2 (Ill. Cir. Ct. Jan. 6, 2003) 3, 4, 5, 6
Transcript of Motion to Suppress, *People* v. *Bartels*, No. 02 CF 86-2 (Ill. Cir. Ct. May 15, 2003) 2, 3, 4, 6

STATEMENT

This case involves a complicated factual scenario in which a driver's voluntary decision to pull over after a fender bender escalated into a police encounter, (arguably) a traffic stop, an arrest for a vehicle-related misdemeanor, two independent sessions of free-floating investigative questioning, and ultimately a search discovering illegal drugs. As Justice Schmidt noted below, "this clearly was not" a "routine traffic stop." Pet. App. 11a (dissenting opinion). Petitioner advanced before the Appellate Court of Illinois – which agreed with the trial court that the drug evidence should be suppressed – no fewer than four different theories of the case: that the officers' actions did not constitute a traffic stop at all; that the officers' drug-related questioning was within the scope of the initial encounter; that the officers acquired reasonable, articulable suspicion of drug possession during the course of their accident investigation; and that respondent consented to the search that revealed the drugs. The courts below implicitly rejected each of these theories in the course of reaching their conclusion that petitioner's conduct violated the Fourth Amendment.

Before this Court, however, petitioner has dramatically recast its argument, claiming for the first time that the case squarely presents a different and supposedly often-litigated question of law: whether the Fourth Amendment – either generally or as inflected through *Terry* v. *Ohio*, 392 U.S. 1 (1968) – prohibits law enforcement officers who have made a lawful traffic stop from conducting questioning unrelated to that traffic violation. By failing to either raise or preserve this question in any of the three courts below, petitioner has long since waived its ability to raise it on appeal to this Court. See, *e.g.*, *Sullivan* v. *Edward Hosp.*, 806 N.E.2d 645, 661 (Ill. 2004) (noting that as a matter of Illinois law, "[i]t is quite established that issues not presented in the petition for leave to appeal are not properly before [the Illinois Supreme] [C]ourt and are deemed waived"). The state courts have not

had an opportunity to address this issue in the first instance, and this case lacks many factual and factual-legal findings that would be necessary for its resolution. Cf. *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). Indeed, petitioner's position in the lower courts was dramatically inconsistent with the position it now takes: if this Court accepts any of the many arguments the State proffered below, then this case does not present the question on which it now seeks review.

Even when this question has been properly presented, this Court has consistently declined to review it, including just last Term in a similar petition from this same petitioner. See *Illinois* v. *Bunch*, 541 U.S. 959 (2004) (No. 03-774); see also *United States* v. *Childs*, 537 U.S. 829 (2002) (No. 01-9795); *United States* v. *Williams*, 535 U.S. 1019 (2002) (No. 01-1422); see also *infra* at 8-9.

But even if this Court were to reverse course and to conclude that this question merits review, this case is an exceptionally poor vehicle for undertaking it. Given the ambiguities in the record and in the unpublished decisions of the trial and intermediate appellate courts, there is a significant risk that antecedent issues – such as whether this case involves a traffic stop at all – would prevent this Court from even reaching the question presented. If, as petitioner contends, the question presented involves a recurring issue as to which courts across the nation actually require more guidance, then surely a cleaner vehicle for providing that elaboration will soon appear.

1. On the evening of June 21, 2002, respondent and a companion, John Zaloudek, were traveling on Interstate 80 in Grundy County, Illinois. Zaloudek was driving the car (a compact Chevrolet Cavalier rented by respondent) while respondent slept in the passenger seat. Pet. App. 3a; Transcript of Motion to Suppress, Part 2, at 5, *People* v. *Bartels*, No. 02 CF 86-2 (Ill. Cir. Ct. May 15, 2003) (hereinafter "TM2"). While passing the scene of an unrelated accident, the car in which Zaloudek and respondent were

traveling and another vehicle (a Chevrolet Suburban) collided. Pet. App. 3a. After the two vehicles passed the scene of the unrelated accident, they both pulled over to the shoulder. *Ibid.*

Once Zaloudek had stopped the car, he woke respondent, told her about the accident, TM2 at 5, and left to speak with the driver of the Suburban. Transcript of Motion to Suppress, Part 1 at 15, *People* v. *Bartels*, No. 02 CF 86-2 (Ill. Cir. Ct. Jan. 6, 2003) (hereinafter "TM1"). After Zaloudek had left the car, respondent decided to drive for the remainder of the trip and she moved from the passenger seat to the driver's seat. TM2 at 6. Thus, when Zaloudek returned to the car, he sat down in the passenger seat. TM1 at 15.

The driver of the Suburban had informed Illinois State Police Trooper Brad Sprague of the fender bender as he passed Sprague, who had been directing traffic at the scene of the earlier accident. Pet. App. 3a. Ultimately, Sprague left the scene of the earlier accident and drove his patrol car to where respondent and Zaloudek were now parked. *Ibid.*

Upon his arrival, Sprague did not proceed with a straightforward accident investigation. (For example, he candidly acknowledged that he did not "put a pen on a crash report" before asking respondent whether she had anything illegal in her car, TM1 at 32, and in fact filled out that report only when he later returned to the station, long after the events in this case occurred, *id.* at 69.) At no time before arresting respondent did Sprague ask respondent or Zaloudek about the cause or circumstances of the accident that Sprague had ostensibly stopped to investigate. *Id.* at 37; TM2 at 37. Nor did he ask for driver information, licenses, registration, or insurance information from the Suburban. TM1 at 36.

Instead, after speaking to the driver of the Suburban for approximately thirty seconds, TM1 at 13, 52, Sprague approached respondent's car. He noticed that Zaloudek, whom he had seen driving when the two cars had passed him

while he was still directing traffic, was now in the passenger seat, and respondent was in the driver's seat. Pet. App. 3a.

Sprague asked Zaloudek to get out of the car and questioned him out of earshot of respondent. TM2 at 6-7. Zaloudek was unable to provide Sprague with a driver's license and ultimately acknowledged that his license had been revoked. Pet. App. 3a. At that point, Sprague informed Zaloudek that he would be arrested for driving on a revoked license – a misdemeanor under Illinois law. *Ibid.*; see 625 ILL. COMP. STAT. 5/6-303 (2005).

To verify Zaloudek's identity, Sprague asked whether Zaloudek had any other form of identification. Pet. App. 3a. When Zaloudek told Sprague that his identification was in respondent's purse, Sprague returned to the car and asked respondent (who on Sprague's own account could have had nothing to do with the accident he was investigating) to provide him with Zaloudek's identification. *Ibid.* When respondent could not locate the identification, Sprague asked for and received consent to search her purse. *Id.* at 4a. Sprague found neither Zaloudek's identification nor any other suspicious or incriminating information during this search. *Ibid.*

Nonetheless, Sprague abandoned any pretense of investigating the minor traffic accident. For example, Sprague did not ask respondent for her insurance information, her driver's license, how the crash occurred, or other information he needed for his accident report. TM1 at 35. Instead, Sprague initiated an investigation into whether respondent was carrying any illegal material in the car, apparently based on the fact that respondent had appeared "extremely nervous." Pet. App. 3a-4a. According to Sprague, after some brief questioning, respondent consented to a search of the car. TM1 at 71. According to respondent, however, she did not give any such consent. Pet. App. 5a.

Before Sprague himself could conduct the search, however, he received a status call from his dispatcher and returned to his patrol car to respond. Pet. App. 4a.

At some point during Sprague's questioning of Zaloudek and respondent, a second officer, Chad Brody, had arrived at the scene.[1] *Id.* Sprague did not discuss any of the details of his investigation with Brody, but simply instructed Brody to wait with Zaloudek. *Id.*; see also TM1 at 86, 92, 94-95, 97. Although Brody testified that "[i]t wasn't my job to investigate the accident," TM1 at 102; see also Pet. App. 4a, he nevertheless launched a second investigation of respondent while Sprague answered the status call. Pet. App. 4a. In response to Brody's questioning, respondent explained that she had been asleep during the accident and mentioned that the car was rented. *Id.* at 102-04. Brody then asked to see the rental agreement. *Id.*

The trial court, in its two-page order, made minimal findings of fact about the critical events that followed, and the record contains conflicting accounts regarding matters the trial court did not resolve. See Order of Circuit Court at 2, *People* v. *Zaloudek*, No. 2002-CF-86-1, 2002-CF-86-2 (July 3, 2003) [hereinafter Trial Court Order]. According to Brody, respondent voluntarily started looking around the car for the rental agreement. TM1 at 105. When she found nothing in the glove box, Brody suggested that respondent look in the center console. TM1 at 107. According to Brody, although respondent had been calm until this point, she now began to shake. TM1 at 121-22. Respondent's nervousness and her refusal to open the console led Brody to suspect that there were drugs in the car. Pet. App. 4a-5a. He then asked for permission to search the vehicle, which he claims respondent granted. TM1 at 128.

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[1] Along with Sprague, Brody had been working at the scene of the first accident. When that accident had been cleared up, Brody saw Sprague pulled over slightly down the road, and decided to assist him. TM1 at 88-92.

Respondent's version differs in several material respects. According to respondent, Brody told her to look in the glove box for the rental papers. TM2 at 9. When no papers were found there, Brody instructed her to search the center console. *Ibid.* Respondent informed Brody that she did not have the papers because she had left them at home. *Ibid.* Brody then demanded again that she look in the center console and stated that if she refused he would get his dog. *Id.* at 9-10. According to respondent, Brody never asked for consent to search the car. *Id.* at 11.

The record is also both incomplete and inconsistent with respect to the length of the stop and the time frame of the encounter. The trial court made no findings about the precise sequence of events or whether the drug investigation lengthened the detention beyond what a straightforward accident investigation would have consumed. See Trial Court Order at 1-2. Indeed, even the testimony from the officers varied widely on this point. See, *e.g.*, TM1 at 39 (Sprague's testimony that only five minutes elapsed between his arrival at the scene and when he asked respondent if she had any contraband in her car); *id.* at 96 (Brody's testimony that the encounter may have lasted as long as a half-hour); *id.* at 39 (Sprague's testimony that he returned to his car for only a minute or two); *id.* at 100 (Brody's testimony that Sprague may not have returned for five minutes). Respondent testified that it took close to twenty minutes between Sprague's arrival and the canine search. TM2 at 27-28.

Shortly after whatever point Brody retrieved his dog from the squad car, the dog indicated for drugs in respondent's car. Pet. App. 5a. A search of the center console revealed cocaine and heroin. *Ibid.* Both Zaloudek and respondent were then arrested. TM2 at 37.

2. Respondent was charged with two drug offenses. She filed a motion to suppress evidence and quash her arrest. Pet. App. 2a. The trial court granted the motion. Its order stated that the questioning and search were not supported by any

independent reasonable and articulable suspicion, and that any drug suspicion was not reasonably related to the original contact with respondent. See *id.* 5a (discussing the trial court's ruling).

3. Petitioner appealed to the Appellate Court of Illinois. Petitioner conceded that the constitutionality of traffic-stop questioning was properly governed by the Illinois Supreme Court's decision in *People* v. *Gonzalez*, 789 N.E.2d 260 (Ill. 2003), and petitioner did not contest the legal underpinnings of that case or otherwise preserve any challenge to the propriety of the *Gonzalez* decision. See, *e.g.*, Pet. Ill. Ct. App. Br. 14, 20. Instead, it argued variously that (1) there had been no traffic stop at all, *id.* at 10-13; (2) the officers' questioning was related to the initial purpose of the stop, *id.* at 16-17, 20; (3) Sprague's questioning was supported by independent reasonable suspicion, *id.* at 17-18, 20-21; and (4) Sprague's questioning did not lengthen the stop or alter its fundamental nature, *id.* at 18, 21-22.

The Illinois Appellate Court affirmed the decision of the trial court in an unpublished, nonprecedential order. Pet. App. 2a. It held that, although the initial stop was justified by the need to investigate an accident and Sprague had probable cause to question Zaloudek about his license and to request his identification from respondent, the questions to respondent about contraband in the car "impermissibly expanded the scope of the traffic stop" because they "had no direct relation to the initial justification of the stop." *Id.* 7a, 8a.

The court analyzed the Fourth Amendment issue independently with respect to the two officers. As to Sprague, the court held that he had "impermissibly prolonged the detention or changed the fundamental nature of the stop * * * [r]egardless of the length of the detention," Pet. App. 9a, because he undertook his drug investigation without having any reason for doing so. Nothing about respondent's conduct "create[d] a reasonable, articulate [*sic*] suspicion that the

vehicle contained contraband." *Id.* With respect to Brody, who actually conducted the search, the court held that his observations provided no justification for a search of the vehicle because "the record does not indicate that he smelled drugs, noticed drug paraphernalia, or observed any unusual drug-related behavior by the defendant." *Id.* 10a. Thus, his "continued questions and his threats of a canine search * * * significantly changed the nature of the investigation." *Id.* 11a.

4. Petitioner sought leave to appeal to the Illinois Supreme Court. Again, it implicitly conceded the correctness of *Gonzalez* and did not ask that the Illinois Supreme Court reconsider that holding or otherwise preserve the issue for further review. See, *e.g.*, Petition for Leave to Appeal in Illinois Supreme Court 12, 17 [hereinafter PLA]. Instead, petitioner simply repeated the arguments that it had made to the intermediate appellate court: there was no traffic stop, *id.* at 10-12; the questioning was related to the initial purpose of the stop, *id.* at 13-15, 17; the questioning was supported by independent reasonable suspicion, *id.* at 15, 17-18; and the questioning did not prolong the detention or change its fundamental nature, *id.* at 16, 18. The Illinois State Supreme Court denied petitioner leave to appeal on those questions. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioner now raises for the first time an issue over which it claims that "[c]ourts across the Nation have long been deeply split," Pet. 5, namely, what limits the Fourth Amendment imposes on police questioning "during a lawful traffic stop." *id.* i. This Court has recently denied certiorari to petitions raising this issue no fewer than three times. See *Bunch*, 541 U.S. 959 (No. 03-774) (presenting question: "After a police officer has lawfully stopped an automobile for a traffic violation, arrested the driver, decided to impound the vehicle, and ordered a passenger to exit the car, may the officer question the passenger and request identification in the

absence of reasonable suspicion that the passenger is engaged in criminal activity[?]"); *Childs*, 537 U.S. 829 (No. 01-9795) (presenting question: "Whether questioning during a traffic stop about a matter beyond the scope of the reason for the traffic stop that is not otherwise supported by reasonable suspicion violates the Fourth Amendment?"); *Williams*, 535 U.S. 1019 (No. 01-1422) (presenting question: "Did [a] trooper's questioning [about a suspect's travel plans] exceed the permissible scope of the stop for speeding?").

There is no reason for the Court to reverse course now and to grant this petition. The state of the law has not changed materially since these denials – particularly so because the most recent one came just last Term in response to a petition by this same petitioner that raised a substantially similar argument and cited many of the same cases. See Pet. for a Writ of Cert. 12-13, *Illinois* v. *Bunch*, 796 N.E.2d 1024 (Ill. 2003), *cert. denied*, 541 U.S. 959 (2004) (No. 03-774). Certainly the instant case – an unpublished opinion from an intermediate state appellate court with no precedential value even in Illinois, see ILL. SUP. CT. R. 23(e) – effects no change in the state of the law that would command this Court's attention.[2]

As the Solicitor General has persuasively argued, there is moreover no conflict among the lower courts on the question presented. See Brief for the United States in Opposition, *United States* v. *Childs* 6-11, 277 F.3d 947 (CA7), *cert. denied*, 537 U.S. 829 (2002) (No. 01-9795) [hereinafter U.S. *Childs* BIO] (discussing the absence of a circuit split on the issue of traffic-stop questioning). To be sure, courts that have confronted this issue have articulated the governing legal standard using different verbal formulations. But petitioner fails to demonstrate that those formulations actually produce

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[2] The Illinois Supreme Court's refusal to grant petitioner leave to appeal the intermediate court's decision in no way signifies its agreement with the reasoning of or result reached by the lower court. See *People* v. *Vance*, 390 N.E.2d 867, 872 (Ill. 1979).

different *results* in cases with similar facts – *i.e.*, that there is a "genuine conflict, as opposed to a mere conflict in principle," Pet. 8 (quoting ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002)).

Even if there were such a conflict, this case would be absolutely the wrong vehicle for addressing it. In order to reach the question presented, this Court would have to resolve, or ignore, a slew of preliminary issues, any one of which might short-circuit this Court's inquiry. If petitioner is right that there is in fact an important and recurring question of Fourth Amendment law regarding questioning at traffic stops, surely a case cleanly presenting that issue will soon come before this Court. Thus, this Court need not, and should not, take a case in which it can reach that issue only by conducting a series of discrete, antecedent factual inquiries, particularly when those issues have not been elucidated by the lower courts.

I. The State of the Record in This Case Threatens to Prevent the Court from Even Reaching the Question Presented.

As Justice Schmidt noted below in his dissenting opinion in the intermediate court of appeals, this case conceivably could be resolved under "numerous theories," Pet. App. 14a, only one of which even arguably involves the constitutionality of traffic-stop questioning. Thus, if the Court were to grant certiorari, it would be faced with two unappealing options regarding how to proceed on the merits. First, it could choose to address these theories and hope that they are resolved in such a way that the case still presents an outcome-determinative question regarding the constitutionality of traffic-stop questioning. Second, it could ignore them and proceed on a number of artificial premises that run counter to petitioner's consistent position in the lower courts.

Neither of these scenarios is a productive use of this Court's resources. The first raises the very real and

unfortunate prospect that, after full briefing and oral argument, the Court would be forced to dismiss the writ as improvidently granted. Cf. *Medellin* v. *Dretke*, No. 04-5928, slip op. at 4, 6 (May 23, 2005) (per curiam) (dismissing writ as improvidently granted because "[t]here are several threshold issues that could independently * * * render advisory or academic our consideration of the questions presented" and concluding that "it would be unwise to reach and resolve the multiple hindrances to dispositive answers to the questions presented"). The second would create confusion among the lower courts regarding this Court's approval or disapproval of various aspects of this case, and the Court would almost certainly have to grant certiorari in one or more follow-on cases to clarify whatever holding it might reach in this one.

There are no fewer than six preliminary issues – most of them emphasized by petitioner below but ignored by it now in its attempt to portray this case as presenting a certworthy question. Cf. Pet. App. 11a (Schmidt, J., dissenting) ("[t]he majority attempts to classify this encounter as a routine traffic stop, which it clearly was not"). On four of these, petitioner itself argued in the courts below a position that, if accepted, would prevent the court from reaching the question it now presents:

1. *The Existence of a Traffic Stop.* Despite the fact that the questions on which petitioner seeks this Court's review depend on this case involving a "lawful traffic stop," see Pet. i, petitioner consistently argued below that this case does *not* involve such a stop. In the lower courts, petitioner asserted that the officers were acting in their "community caretaking" capacity, as described by this Court's opinion in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973). See PLA 10-12; see also Pet. Ill. Ct. App. Br. 10-13. Petitioner based this conclusion on the uncontested fact that the police were not responsible for respondent's car stopping along the side of the road. Instead, the car in which Zaloudek and respondent had been traveling stopped of its own accord when Zaloudek and the

driver of the other car involved in the accident voluntarily pulled over to exchange information.

Respondent has consistently maintained, and the courts below agreed, see Pet. App. 7a, that the officers' behavior in keeping respondent and Zaloudek at the scene *did* constitute a seizure for Fourth Amendment purposes. Under her view of the facts, which both the trial and intermediate appellate courts adopted, the officers were not entitled to question her absent reasonable suspicion to believe that she was engaged in criminal activity, a suspicion they lacked. See Pet. App. 8a-11a; Trial Court Order at 2.

Petitioner must have recognized, however, that the question of when an entirely unofficial cessation of movement becomes a seizure for Fourth Amendment purposes does not warrant this Court's review, as there is no conflict on this question among the lower courts. And it is surely aware that this Court does not sit as "a court for correction of errors in factfinding," *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Thus, it has downplayed, perhaps only temporarily, its factual claims about the nature of the encounter in this case.

If this Court wants to resolve the issue of traffic-stop questioning, it should select a case that unambiguously involves a traffic stop. In contrast, the idiosyncratic nature of both Sprague's and Brody's presence on the scene, and the "unusual circumstances" of this case in general, Pet. App. 9a, suggest that this case may well turn on "a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity." *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984).

2. *The duration of the stop and contraband questioning.* Although the parties dispute how long the stop lasted, see *supra* at 6, the trial court's order contains no factual findings whatsoever regarding the disputed question of the amount of

time that the officers spent questioning respondent about contraband. See Trial Court Order at 1-2.

The lack of any findings on this issue makes this case a flawed vehicle for resolving any question about the constitutionality of conducting unrelated questioning at a traffic stop because every federal court of appeals and state supreme court to have addressed the question agrees that the duration of questioning is *highly* relevant to the Fourth Amendment reasonableness inquiry that governs traffic stops.[3]

The state of the record here will make it impossible for this Court to address that critical issue of unreasonable length. There is simply no way for the Court to determine how long the questioning actually lasted, and thus, this case is unlikely to enable the Court to issue more general guidance on the

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[3] See *United States* v. *Burton*, 334 F.3d 514, 519 (CA6 2003) (holding that the challenged stop was constitutional because its scope and duration were reasonable), *cert. denied*, 540 U.S. 1135 (2004); *United States* v. *Childs*, 277 F.3d 947, 952 (CA7) (noting that "[q]uestioning that prolongs the detention, yet cannot be justified by the purpose of such an investigatory stop, is unreasonable under the fourth amendment"), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Holt*, 264 F.3d 1215, 1230 (CA10 2001) (en banc) (holding that Fourth Amendment reasonableness is to be judged by examining duration and manner of stop); *United States* v. *Ramos*, 42 F.3d 1160, 1164 (CA8 1994) (concluding that "continuing to detain the defendants after their licenses and registration had been checked was a violation of the Fourth Amendment"), *cert. denied*, 514 U.S. 1134 (1995); *United States* v. *Shabazz*, 993 F.2d 431, 436 (CA5 1993) (stating that questioning unrelated to the purpose of the stop can impermissibly extend its duration and thus render it unconstitutional); *State* v. *Akuba*, 686 N.W.2d 406, 415 (S.D. 2004) (same); *State* v. *McKinnon-Andrews*, 846 A.2d 1198, 1203 (N.H. 2004) (stating that a question would violate the Fourth Amendment if "in light of all the circumstances, the question impermissibly prolonged the detention"); *Gonzalez*, 789 N.E.2d at 270 (same).

dividing line between constitutionally reasonable and unreasonable stops.

Moreover, the durational issue is further clouded by a lack of clarity regarding how long the encounter *should* have lasted. In the mine run of cases where a single vehicle is stopped for an observed traffic violation, there is a clear-cut *terminus ad quem* to the initial seizure: absent the unrelated questioning, the motorist would presumably have been free to leave as soon as the officer had run a license check and issued a citation. However, the "unusual circumstances" of this encounter, Pet. App. 9a, differed in at least three important ways, and thus taking this case would not provide the Court with an opportunity to clarify the law with respect to that far broader category of cases. First, ambiguity regarding the proper scope of the stop, see *infra* at 14-16, necessarily creates uncertainty regarding its proper length. Second, even accepting Sprague's interpretation – that nobody was free to leave until he obtained all of the information necessary to complete an accident report, Pet. App. 7a – the codependent nature of the officers' interactions with the two vehicles distinguishes this from the typical one-car traffic stop. Finally, Sprague's decision to arrest Zaloudek *before* starting to question respondent changed the nature of the encounter even from what might be normal for such a multiple-vehicle investigation.

Granting certiorari here would likely commit the Court to granting review in at least one additional case that, unlike this one, contains factual findings regarding both the actual and the otherwise proper length of the investigation in question. Because the *entire* issue of traffic-stop questioning – including, but not limited to, proper length – could be resolved in such a case, nothing would be gained by granting certiorari now.

3. *The scope of the officers' investigation.* The decisions of the trial and intermediate appellate courts rest on a conclusion which respondent pressed before those courts and

continues to maintain, that the questioning in this case "was not reasonably related to the original contact with *defendants*." *Trial Court Order at 2*; *see also* Pet. App. 8a. Perhaps it is thus understandable that petitioner frames the issue before this Court as whether the Fourth Amendment prohibits questioning "unrelated to the traffic violation that justified the stop." Pet. i.

But neither opinion below ever specified precisely which "traffic violation" was involved in this case.[4] There are two possibilities, and they point in dramatically different directions. Undoubtedly, Zaloudek committed a traffic violation by driving with a revoked license. If *that* is the sole relevant violation, then questioning regarding drugs or other contraband is unrelated to the violation, because the fact that a motorist has an invalid license is not closely related to non-vehicular criminality. If this Court were to agree with petitioner's position in the courts below that no stop occurred until Sprague discovered this violation and arrested Zaloudek and simultaneously to agree with respondent's position that the questioning was unrelated to any justification for a stop, then the relationship between the violation and the questioning would pose no obstacle to reaching the question presented.

But it is entirely possible to reach a different conclusion. Respondent argued below, and the courts seemingly agreed, that Sprague made his decision to seize Zaloudek and respondent *before* he was aware of the license-related violation. See Pet. App. 7a (noting that Sprague's "purpose

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[4] Thus, this case is quite different from the mine run of traffic stop cases that produce evidence of other crimes, in which some clearly specified vehicular violation leads to an officer pulling over a motorist. See, *e.g.*, *Arkansas* v. *Sullivan*, 532 U.S. 769 (2001) (speeding and improperly tinted windshield); *Ohio* v. *Robinette*, 519 U.S. 33 (1996) (speeding); *Whren* v. *United States*, 517 U.S. 806 (1996) (turning without signaling and driving at an unreasonable speed).

for the stop was to investigate an accident and complete an accident report" and that he had testified that "once he began his investigation, no one was free to leave"). Under this scenario, the relevant "traffic violation" might be construed to concern Zaloudek's driving and the fender bender that led Zaloudek and the driver of the Suburban to pull over "without the trooper's direction." Trial Court Order at 1. Under this scenario, petitioner has argued that the officers' questioning was *not* "unrelated to the traffic violation," Pet. i, because the officers' purpose was to investigate the accident and its causes, including the possibility of narcotics use. Pet. Ill. Ct. App. Br. 16-17, 20; PLA 13-15, 17. But neither court below made any factual finding as to whether either officer had reason to believe that Zaloudek had committed a moving violation that might suggest he was driving while impaired. Without deciding that antecedent question – a determination involving not only facts that are absent from the record but also questions of Illinois law that this Court is ill-suited to address – this Court will find itself adjudicating a case on the basis of an artificial, highly stylized version of the facts and a petitioner's embrace of an internally incoherent theory of what actually occurred.

4. *Whether the officers had independent reasonable suspicion to ask respondent about contraband.* Although the lower courts determined that questions regarding contraband were not supported by reasonable suspicion, Trial Court Order at 2; Pet App. 9a, 10a, this Court subjects such determinations to *de novo* appellate review. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). Petitioner notably has argued throughout this case that the officers *did* have a reasonable basis for questioning Zaloudek and respondent concerning contraband. See Pet. Ill. Ct. App. Br. 17-18 (arguing Sprague had reasonable suspicion that there was contraband in the car); *id.* at 20-21 (arguing Brody had reasonable suspicion of contraband in the center console); PLA 15 (arguing Sprague had reasonable suspicion that there

was contraband in the car); *id.* at 17-18 (arguing Brody had reasonable suspicion that there was contraband in the car).

If this Court were to agree, the question presented would become entirely irrelevant to its disposition of this case, because the existence of reasonable suspicion is independently sufficient to support the constitutionality of police questioning. See, *e.g.*, *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2458 (2004). Consequently, there would be absolutely no reason to grant the petition; petitioner has failed to identify a single lower court that has ever held that questioning at a traffic stop as to which officers actually *have* reasonable suspicion is impermissible. Under this scenario, petitioner would be seeking nothing more than simple error correction of the sort this Court consistently declines to perform.

5. *Consent.* As Justice Schmidt suggested in dissent from the Illinois Appellate Court's Order, the question presented could also be rendered moot if the Court were to find that respondent voluntarily consented to the search. See Pet. App. 14a (listing consent as "not the least of" the theories under which the case could be decided). The record is unclear regarding whether consent was actually given, when it might have been given, and whether it might have been voluntary.[5] Were this Court to find that respondent did give

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[5] The trial court agreed with respondent that the search was unconstitutional "whether or not consensual," Trial Court Order at 2, and thus did not decide the question of consent. It noted that respondent initially agreed to the search (though it did not make clear precisely when), but also found that she subsequently refused to look in the vehicle's center console, where the drugs were located. *Ibid.* The appellate court apparently reached no conclusion regarding the state of the factual record on the question of consent, as its description of the facts simply catalogues the conflicting accounts of the different participants in the encounter regarding whether or not respondent ever agreed to the search. See Pet. App. 4a (recounting Sprague's testimony that respondent gave consent to him); *id.* 5a (recounting Brody's testimony that

consent and that consent was voluntary, it would then have to address whether this would supersede any Fourth Amendment violation that might have taken place beforehand or afterward. See, *e.g.*, See *United States* v. *Ramos*, 42 F.3d 1160, 1164 (CA8 1994) (finding that the signing of a consent form mooted a prior Fourth Amendment violation), *cert. denied*, 514 U.S. 1134 (1995). The result of this inquiry could render unnecessary any consideration of whether the questioning constituted such a violation.

6. *Search incident to arrest.* Justice Schmidt also noted that Sprague's statement to Zaloudek that he would be arrested – made *before* Sprague asked for consent to search the vehicle – might mean that the search was justifiable as being incident to an arrest. See Pet. App. 13a. Indeed, language in the trial court's order that "[t]he arrest for driving revoked *had been made*," Trial Court Order at 2 (emphasis added), might be read to support that conclusion. If this Court were to uphold the search on this rationale, it would never reach the question presented.

* * * *

In sum, in order to use this case to resolve the constitutional questions that petitioner claims warrant this Court's attention, the Court would first need to determine that this was a traffic stop (as opposed to an accident investigation as a part of the officers' "community caretaking" function); that the officers' questions regarding contraband were unrelated to the (as-yet-undetermined) purpose of the investigatory stop, whenever it occurred; that there was no independent basis for the officers' suspicions that prompted their questioning; that the questions about contraband did not impermissibly extend the duration of the stop; that respondent did not give voluntary consent that would supersede any Fourth Amendment violation; and that the search was not

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respondent gave consent to him); *ibid.* (recounting respondent's denial that she gave consent to either officer).

otherwise justified as a search incident to arrest. If this Court were to decide otherwise on even a single one of these predicate questions – four of which have been contested by petitioner and two of which were asserted by a judge below – then it would find itself foreclosed from reaching the questions on which it granted certiorari and mired instead in adjudicating a set of contested factual disputes.

If this Court decides that it is necessary to provide greater guidance regarding the legal issues petitioner identifies, it surely need not do so in a case that depends on no fewer than six contingent, contested factual and legal inquiries. It should, instead, wait for a more appropriate case that squarely and cleanly presents the question. Such a vehicle should not be difficult to find: the cases cited by petitioner provide uncontroversial examples of officers clearly stopping motorists for traffic violations (rather than simply happening on the scene of an accident), issuing citations (rather than arresting the motorist), and conducting questioning regarding crimes unrelated to operation of the vehicle. See Pet. 6-7.

There is no reason to believe that this Court will have to wait long before another such case presents itself, and such a case would suffer none of the numerous defects present in this one. Where an officer exercises his authority to pull over the motorist, there is no question that a stop is involved; where the scope of the traffic violation is clear, it is straightforward to decide whether questions about contraband are unrelated to the purpose of the stop; where the suspect has done nothing beyond commit a moving violation, there is no question that the officer lacks reasonable suspicion to ask about contraband; and where the questioning takes place while the officer is otherwise processing the driver's citation, there is no potential claim that the questioning unreasonably extended the duration of the stop. Nor is such a case likely to present the complicated and unresolved issues of consent and arrest prior to the search that are present here. A case of that type surely presents a better vehicle for resolving the question

presented than the "unusual circumstances," Pet. App. 9a, of this case.

II. There Is No Actual Conflict Among the Lower Courts on the First Question Presented That Requires This Court's Intervention.

In any event, there is no split among the lower courts that merits this Court's review. See U.S. *Childs* BIO at 6-11. As petitioner correctly notes, "'[a] genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, *based on their holdings in different cases with very similar facts.*'" Pet. 8 (quoting STERN ET AL., *supra*, at 226 (emphasis added)). Petitioner's asserted conflict does not meet this standard.

1. In its attempt to demonstrate a split, petitioner cites nine cases decided by federal courts of appeals or state supreme courts. See Pet. 6-7.[6] To be sure, those courts use different verbal formulations in the course of their Fourth Amendment analysis. But they reach identical *results*: each of the courts concluded that under its test, however

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[6] Petitioner attempts to bolster its assertion that "numerous state courts of last resort" have considered the question it presents, Pet. 6, by citing decisions of intermediate appellate courts from five additional states. See *id.* at 6-7 (citing *State* v. *Middleton*, 43 S.W.3d 881 (Mo. Ct. App. 2001); *State* v. *Gibbons*, 547 S.E.2d 679 (Ga. Ct. App. 2001); *State* v. *Parkinson*, 17 P.3d 301 (Idaho Ct. App. 2000); *State* v. *Gaulrapp*, 558 N.W.2d 696 (Wis. Ct. App. 1996); *State* v. *Taylor*, 973 P.2d 246 (N.M. Ct. App. 1998)). Like the intermediate appellate decision on which petitioner seeks certiorari here, none of these decisions represents the last word of a state regarding the proper application of the Fourth Amendment, and any conflict among them would not merit this Court's attention. Cf. SUP. CT. R. 10(a), (b) (explaining that this Court usually grants certiorari to resolve conflicts among federal courts of appeals and/or "state court[s] *of last resort*" (emphasis added)).

articulated, the traffic-stop questioning at issue was permissible.[7] Thus, petitioner cannot show a true conflict.

Indeed, in only one of the cases petitioner identifies did a court hold that the Fourth Amendment had been violated. But the violation there stemmed not from unlawful *questioning* during the course of a traffic stop, but instead from unlawful *detention* after the stop was fully completed. See *Ramos*, 42 F.3d at 1164 ("[W]e believe that continuing to detain the defendants after their licenses and registration had been checked was a violation of the Fourth Amendment."). The police in *Ramos* kept one defendant in the patrol car for questioning even after having completed the investigation of the traffic violation by issuing a warning to the other. See *id.* at 1161-62. The Eighth Circuit determined that this additional detention was unsupported by any reasonable suspicion and was therefore unconstitutional. *Id.* at 1164. This unexceptional and correct application of *Terry* v. *Ohio* – see 42 F.3d at 1163 (citing *Terry*) – certainly does not create a circuit split. This is particularly true because the court went on to deny the suppression motion, holding that the

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[7] See *Burton*, 334 F.3d at 518-19 (holding that questioning did not render the stop unreasonable); *Childs*, 277 F.3d at 954 (holding that the questioning did not render the stop unreasonable); *United States* v. *Murillo*, 255 F.3d 1169, 1174 (CA9 2001) (holding that the officer's questions were supported by reasonable suspicion), *cert. denied*, 535 U.S. 948 (2002); *Holt*, 264 F.3d at 1217 (holding that the officer's question about the presence of a loaded weapon was justified on grounds of officer safety); *Ramos*, 42 F.3d at 1164 (holding that regardless of the permissibility of the questioning, the defendant voluntarily consented to the search); *Shabazz*, 993 F.2d at 437 (holding that the questioning did not exceed the proper scope of the stop); *Akuba*, 686 N.W.2d at 417 (holding that the questioning did not impermissibly extend the scope of the stop); *McKinnon-Andrews*, 846 A.2d at 1204-05 (holding that the officer's questions were supported by reasonable suspicion); *Gonzalez*, 789 N.E.2d at 270 (holding that the questioning did not render the stop unreasonable).

defendant's "voluntary signing" of a consent form authorizing the search of his car "was sufficiently an act of free will to purge the taint of the preceding illegal detention." *Id.* at 1164.

2. The cases cited by petitioner aptly illustrate why this Court should grant certiorari only for a "genuine conflict" rather than a "conflict of principle," STERN ET AL., *supra*, at 226. Because none of the cases resulted in the suppression of evidence, none of them gave the deciding court an opportunity to flesh out fully where it would draw the line of unreasonability under the Fourth Amendment as it relates to traffic-stop questioning. Only when and if future cases actually do suppress evidence will it be clear whether the lower courts have adopted conflicting approaches to the determination whether an officer committed a Fourth Amendment violation based on traffic-stop questioning. And only then would the Court be able to determine whether there exists a set of facts on which different lower courts would reach different results regarding suppression of evidence, and, if so, whether the set is significant enough to warrant certiorari.

The absence of clear conflict among the lower courts is most apparent in the four cases that did not ultimately turn on the issue of traffic-stop questioning at all. As discussed *supra*, *Ramos* turned on issues of detention and voluntary consent, rather than on the proper scope of questioning. Both *United States* v. *Murillo*, 255 F.3d 1169 (CA9 2001), *cert. denied*, 535 U.S. 948 (2002), and *State* v. *McKinnon-Andrews*, 846 A.2d 1198 (N.H. 2004), found that the questioning at issue was supported by the existence of independent reasonable suspicion. See *Murillo*, 255 F.3d at 1174; *McKinnon-Andrews*, 846 A.2d 1203-04.[8] Because this

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[8] Moreover, *McKinnon-Andrews* discussed the issue of traffic-stop questioning under the rubric of *state*, rather than federal, constitutional law. See 846 A.2d at 1201 ("We first address [petitioner's] claim under the State Constitution * * * and cite

finding was sufficient to render the questioning constitutional, it was irrelevant whether the traffic stop itself also might have justified the questioning, and the courts' discussions of that issue were unrelated to their ultimate holdings. See also *supra* at 16-17. And in *United States* v. *Holt*, 264 F.3d 1215 (2001) (en banc), the Tenth Circuit disposed of the only actual issue in the case by creating a narrow public-safety rule allowing suspicionless questioning about loaded weapons. See *id.* at 1228-30. Its further discussion – in the opinion of a separate majority – of the proper scope of traffic-stop questioning, see 264 F.3d at 1228-30, was dictum. See 264 F.3d at 1227 (opinion of Ebel, J.); *id.* at 1238 (opinion of Kelly, J.); see also U.S. *Childs* BIO at 10-11.[9]

Even those cases that did actually turn on the issue of traffic-stop questioning were so fact-dependent that they did not create sweeping constitutional rules that amount to a conflict among the lower courts. *United States* v. *Burton*, 334 F.3d 514 (CA6 2003), *cert. denied*, 540 U.S. 1135 (2004), simply held that "the scope and duration of the traffic stop in this case was reasonable," *id.* at 519, leaving for another day a definitive determination of what kind of traffic stop might be *un*reasonable. *Gonzalez*, 789 N.E.2d 260, held that requesting identification from a passenger did not "impermissibly prolong [the] defendant's detention" or "change[] the fundamental nature of the stop," *id.* at 270, but the facts of the case did not give the Illinois Supreme Court the opportunity to define what type of questioning might give

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federal authority for guidance only.") (citation omitted). The only federal issue in the case was resolved in a single sentence in the final paragraph, where the court correctly and unremarkably recognized that police questioning supported by reasonable suspicion does not violate the Fourth Amendment. See *id.* at 1204 (citing *Terry*).

[9] The Seventh Circuit has noted that this discussion was also dictum because the initial stop in *Holt* was a checkpoint stop rather than a traffic-violation stop. See *Childs*, 277 F.3d at 952.

rise to such constitutional infirmities. The remaining three cases all agreed that overly long questioning would violate the Fourth Amendment – see *United States* v. *Childs*, 277 F.3d 947, 952 (CA7), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Shabazz*, 993 F.2d 431, 437 (CA5 1993); *State* v. *Akuba*, 686 N.W.2d 406, 415 (S.D. 2004) – but since none of them held that the questioning at issue failed this standard, it remains unclear where each of these courts would draw the temporal line of unreasonability.

It would be premature for this Court to grant certiorari now to address the issue of traffic-stop questioning. Without more decisions in the lower courts, it is impossible to predict whether a true conflict among them will someday arise – that is, whether the courts' different verbal formulations of the Fourth Amendment's requirements will actually produce different results in factually similar cases. As of now, the courts' actual results have dovetailed. Moreover, even if such conflict were inevitable, this Court's consideration of the question would benefit from concrete examples of how different ways of articulating the reasonableness inquiry play out in different factual scenarios.

This Court should accordingly deny certiorari and allow the issue time to percolate in the lower courts.

3. Because petitioner demonstrates no conflict among the federal courts of appeals and state courts of last resort, it cannot demonstrate that this Court's intervention is necessary merely by citing two cases decided by the Illinois Appellate Court – *People* v. *Lomas*, 812 N.E.2d 39 (2004), and *People* v. *Leigh*, 792 N.E.2d 809 (2003) – and asserting that their results conflict with the Seventh Circuit's decision in *Childs*. See Pet. 8. Apparently, in neither of those cases did petitioner seek review in the Illinois Supreme Court, which would have been the proper forum to address any disagreement with those outcomes, particularly because those cases did not raise the various preliminary issues that make this case (which was presented to the state supreme court) an unsuitable vehicle for

resolving the question presented. Without allowing the Illinois Supreme Court to address the question whether its precedents have been properly applied, petitioner cannot present these cases as indicative of settled Illinois law. See also *supra* at 23 (noting that *Gonzalez* did not allow the Illinois Supreme Court to precisely define when questioning would be unconstitutional).

Potential disparities among lower state courts or district courts in applying state and federal appellate precedents do not require the time and attention of this Court. It is properly the role of the state courts of last resort and federal courts of appeals to directly supervise these lower courts and to assure that the law is applied consistently within each jurisdiction. This is particularly true with respect to heavily fact-intensive questions such as reasonableness under the Fourth Amendment. Principles of sound judicial administration thus counsel strongly in favor of denying certiorari and instead waiting to determine whether an actual conflict develops that cannot be resolved satisfactorily in any other court.

III. Petitioner's Second Question Presented Provides No Additional Claims That Warrant This Court's Review.

Petitioner purports to identify two distinct questions presented by this case: first, what limits does the Fourth Amendment impose on traffic-stop-related questioning (see *supra*), and second, do any of those limits arise out of this Court's decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968)? As with the first question, petitioner waived this second, "methodological" question, Pet. 11, by failing to raise it below. See *supra* at 1-2; see also *id.* at 7, 8.

In any event, while the second question may perhaps raise methodological claims of academic interest, these claims lack any substantial practical consequence and this case provides an exceptionally poor vehicle for resolving them. The reason is simple: *Terry* involves "investigative" encounters between police and civilians, rather than seizures

based on probable cause to believe that a crime has been committed. For reasons respondent has already explained, however, the record in this case is ambiguous as to the temporal relationship between when the seizure in this case occurred and when the officers involved had probable cause to believe that any crime had occurred. See *supra* at 14-16. If, as respondent has consistently argued, the seizure in this case occurred when Trooper Sprague pulled up at the scene of accident and decided to prohibit anyone from leaving the scene while he investigated the fender bender, then this case involves a quintessential *Terry* situation. At that point, Zaloudek and respondent were already stopped "without the trooper's direction." Trial Court Order at 1. Nothing in the record shows that at that point Sprague had reasonable suspicion, let alone probable cause, to believe that Zaloudek or respondent had committed any crime. Indeed, nothing in the record shows that any vehicle-related crime *other* than driving with a revoked license (a crime as to which Sprague could have had no inkling until after his investigation was underway) *ever occurred*. By contrast, the mine run of cases to which petitioner points involve uncontroversial cases of probable cause, because they involve police-initiated contacts based on officers' observation of moving violations.

Even if this difficulty were somehow resolved and some clear "traffic stop" and seizure were identified, see *supra* at 11-12, 14-16, the second question simply repackages the first and thus adds nothing to this Court's consideration of the case. The result the Court reaches on the first question will necessary dictate the result it reaches on the second. The appellate court agreed with respondent that the officers' questioning was unrelated to the original purpose of the officers' investigation. Pet. App. 8a, 10a. If this determination is both correct and legally significant, then *Terry* unambiguously supplies the proper standard for evaluating the officers' conduct. Assuming there was a traffic stop in the first place, the additional, unrelated questioning would nevertheless have constituted a separate police

encounter unsupported by probable cause and thus governed by *Terry*.

An examination of the cases cited by petitioner confirms that the second question merely restates the first and does not present an independent ground for granting certiorari. Even as to the question whether *Terry* should apply to police-motorist encounters stemming from traffic stops based on officers' observations of moving violations, the circuit split identified by petitioner is speculative at best. None of the cases it identifies supports the conclusion that the broader "methodological" disagreement over the applicability of *Terry* has arisen in any circumstance other than questions posed to occupants of vehicles based on less than reasonable suspicion.[10]

Several of the cases cited by petitioner do not implicate *Terry* in any way. See *United States* v. *Garcia*, 376 F.3d 648, 650-51 (CA7 2004) (upholding search of defendant's *house* because he was under arrest for driving without a license and while intoxicated); *Mena* v. *City of Simi Valley*, 332 F.3d 1255 (CA9 2003) (involving questions during a seizure based on search warrant of a *home*), *vacated and remanded sub nom. Muehler* v. *Mena*, 125 S. Ct. 29 (2004).[11] Several other

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[10] As noted *supra* at 13 & n.3, all courts agree that it may be unreasonable under the Fourth Amendment to prolong the encounter without at least reasonable suspicion, regardless of whether they apply *Terry* or not. Thus, *Purcell*, 236 F.3d 1274, 1277-79 (CA11 2001); *Barch* v. *State*, 92 P.3d 828 (Wyo. 2004); *United States* v. *Wellman*, 185 F.3d 651, 656 (CA6 1999); and *State* v. *Dickey*, 706 A.2d 180, 184 (N.J. 1998) (noting that the court focused "on the duration of this stop"), to the extent they turned on the length of the detention, are not implicated by this question.

[11] Because *Mena* involved questioning during the course of executing a lawfully obtained search warrant, nothing in the Court's decision there should affect the outcome in this case.

cases involved open-air canine sniffs of vehicles, see *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 645 (CA8 1999); *Barch* v. *State*, 92 P.3d 828 (Wyo. 2004), and any uncertainty on these facts was addressed by this Court's recent decision in *Illinois* v. *Caballes*, 125 S. Ct. 834 (2005).

The remaining cases cited by petitioner all revolve around police questioning of occupants of lawfully detained vehicles, the exact circumstance implicated by the petition's first question presented. See, *e.g.*, *Childs*, 277 F.3d at 952-54; *United States* v. *Purcell*, 236 F.3d 1274, 1279-80 (CA11 2001).[12] Thus, petitioner's recapitulation of the first question presented does not capture any additional cases or circumstances beyond those noted in the first question.[13]

Finally, petitioner's brief, unsupported suggestion that the Court should GVR in light of *Caballes*, see Pet. 16, lacks any foundation. *Caballes* concerned whether a canine drug sniff constituted a search in the first place, whereas this case is about the very different issue of whether police questioning that preceded such a sniff comported with the Constitution. Petitioner concedes, as it must, that the Illinois Appellate Court did not rest its decision on whether the canine sniff of the car violated the Fourth Amendment, see Pet. 5, n.*, and thus there would be no reason for the court of appeals to reconsider its ruling in light of *Caballes*.[14]

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[12] Petitioner's reliance on the Minnesota Supreme Court's decision in *State* v. *Askerooth*, 681 N.W.2d 353 (2004), is particularly misplaced, as the Minnesota court ultimately decided the case on state constitutional grounds. See *id.* at 361-71.

[13] The complicated and detailed analysis necessary to reveal the complete overlap of cases between the first and second questions again demonstrates how fact-specific any determination of the questions presented in this petition will be. A case with a clearer record and fewer ancillary issues would present a better vehicle.

[14] If petitioner's claim is instead that *Caballes* somehow bears upon the correctness of the *Gonzalez* rule, this argument has been

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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waived by petitioner's failure to raise any challenge below to *Gonzalez*. See *supra* at 1-2; see also *supra* at 7, 8.

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(3)

No. 04-1066

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

MICHELLE L. BARTELS, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. This Case Presents an Ideal Vehicle to Resolve the Questions Presented 1

A. The Factual Record Is Complete and Clear 1

B. No Preliminary Issues Will Prevent the Court from Reaching the Questions Presented 2

C. Illinois Did Not Forfeit Its Positions on the Questions Presented 5

II. There Is a Deep, Intractable and Genuine Split on the Questions Presented 7

III. At a Minimum, The Judgment Below Should Be Vacated and Remanded for Reconsideration in Light of *Caballes* and *Muehler* 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page(s)**

Campbell v. State, 97 P.3d 781 (Wyo. 2004) 7, 8, 9

Childs v. United States, 537 U.S. 829 (2002) 9

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 7

Dineen v. City of Chicago, 125 Ill. 2d 248, 531 N.E.2d 347 (1988) 5

Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) 2

Hernandez v. New York, 500 U.S. 352 (1991) 2

Illinois v. Bunch, 541 U.S. 959 (2004) 6

Illinois v. Caballes, 125 S. Ct. 834 (2005) 3, 4, 9, 10

Illinois v. Harris, 125 S. Ct. 1292 (2005) 10

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 5, 7

Mathias v. WorldCom Tech., Inc., 535 U.S. 682 (2002) . . . 6

Muehler v. Mena, 125 S. Ct. 1465 (2004) 9, 10

People v. Bunch, 207 Ill. 2d 7, 796 N.E.2d 1024 (2003), cert. denied, 541 U.S. 959 (2004) 6, 8, 9

People v. Caballes, 207 Ill. 2d 504, 802 N.E.2d 202 (2003), vacated sub nom., *Illinois v. Caballes*, 125 S. Ct. 834 (2005) 4

People v. Gonzalez, 204 Ill. 2d 220, 789 N.E.2d 260 (2003) 2, 6, 9

People v. Leigh, 341 Ill. App. 3d 492, 792 N.E.2d 809 (2003) 8

People v. Lomas, 349 Ill. App. 3d 462, 812 N.E.2d 39 (2004) 8

People v. Roberson, 212 Ill. 2d 430, 819 N.E.2d 761 (2004) 6

State v. Gibbons, 248 Ga. App. 859, 547 S.E.2d 679 (2001) 8

State v. Taylor, 126 N.M. 569, 973 P.2d 246 (App. 1998), cert. denied, 126 N.M. 534, 972 P.2d 353 (1999) ... 8

Terry v. Ohio, 392 U.S. 1 (1968) 1, 5, 6

United States v. Childs, 277 F.3d 947 (7th Cir.) (*en banc*), cert. denied, 537 U.S. 829 (2002) 8, 9

United States v. Vonn, 535 U.S. 55 (2002) 7

United States v. Williams, 504 U.S. 36 (1992) 7

United States v. Williams, 271 F.3d 1262 (10th Cir. 2001), cert. denied, 535 U.S. 1019 (2002) 9

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 7

Williams v. United States, 535 U.S. 1019 (2002) 9

Yee v. Escondido, 503 U.S. 519 (1992) 5, 6

Constitutional Provision:

U.S. Const., amend. IV ..... *passim*

Rule:

Supreme Court Rule 14.1 4

Miscellaneous:

R. STERN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 4

Brief in Opposition, No. 03-923 3

Reply in Supp. of Pet. for Cert., No. 03-774 9

Reply in Supp. of Pet. for Cert., No. 03-923 3

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

There is a deep and enduring split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from questioning the motorist about matters (*e.g.*, the presence of drugs or guns in the vehicle) unrelated to the traffic violation that justified the stop. Among federal courts of appeals and state courts of last resort, four require no independent justification for such questions; at least three prohibit such questions absent reasonable suspicion; and two require reasonable suspicion if the questions change the fundamental nature of the stop. Pet. 6-8. This split, which has been acknowledged by commentators and lower courts alike (*id.* 8-9), is ripe for resolution. So, too, is the related split over whether the *Terry* doctrine governs in this context. *Id.* 11-14.

Respondent asserts that this case is a poor vehicle to resolve those splits. Opp. 10-20. As shown in Section I, *infra*, her arguments ignore fundamental certiorari principles and are meritless. Her argument that the splits are not "genuine" (Opp. 20-28), is equally meritless, as shown in Section II, *infra*.

I. This Case Presents an Ideal Vehicle to Resolve the Questions Presented.

A. The Factual Record Is Complete and Clear.

Respondent contends that this case "involves a complicated factual scenario," suffers from factual "ambiguities," and can be resolved only "on the basis of a highly stylized version of the facts." Opp. 1, 2, 16. To support her contention, respondent cites what she characterizes as holes in the record and the trial court's order. *Id.* 1-7.

Respondent's focus on the record and the trial court's order disregards the settled principle that, for purposes of this Court's review, the governing facts are those articulated by the highest

state court to reach the merits. See *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue"); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) (accepting the state supreme court's factual findings because "they are not without factual foundation"). Here, the opinion below very plainly sets forth the relevant events and chronology of the traffic stop. Pet. App. 3a-5a. Respondent does not and could not argue that those facts are in any way ambiguous or incomplete, or that they fail to provide an adequate factual predicate for this Court's review of the questions presented. Opp. 7-8 (summarizing opinion below). Accordingly, the supposed ambiguities that respondent discerns in the record and the trial court's order (see *id.* 2-6) pose no obstacle to certiorari.

In a further effort to muddy the facts, respondent thrice mentions the appellate court's reference to the "unusual circumstances of this case." Pet. App. 9a (cited in Opp. 12, 14, 20). But context reveals that the court found this case "unusual" simply because two officers, rather than one, asked respondent about contraband. *Ibid.* ("Under the unusual circumstances of this case, our analysis does not end with Officer Sprague. Because the investigation was still in progress and had yet to be completed, we must apply the *Gonzalez* test to Officer Brody's questions as well."). Because the same Fourth Amendment analysis applies to both officers' inquiries, the fact that two officers posed materially identical questions to respondent does not affect, let alone forestall, this Court's resolution of the questions presented.

B. No Preliminary Issues Will Prevent the Court from Reaching the Questions Presented.

Respondent counts six (!) supposedly "antecedent" issues that would prevent this Court from reaching the questions presented. Opp. 2, 10-20. Respondent is incorrect. None of

those issues is raised in the petition, and none poses an obstacle to resolving the questions presented.

One of respondent's "antecedent" issues concerns the duration of the traffic stop. Opp. 12-14. Respondent argues that because "the trial court's order contains no factual findings" regarding duration, this Court cannot determine the stop's constitutional validity. *Id.* 13-14. In so arguing, respondent again forgets that it is the appellate court's opinion, not the trial court's order, that is under review. The appellate court relied exclusively upon the scope of the stop, not its duration, in holding that the officers' questions violated the Fourth Amendment. Pet. App. 9a ("Regardless of the length of the detention, asking [respondent] if she had anything illegal in the car went well beyond" the purpose the stop). Accordingly, this matter comes to the Court as a pure "scope of the stop" case, not a "duration of the stop" case, and therefore provides an appropriate vehicle to answer the questions presented. See *Illinois v. Caballes*, 125 S. Ct. 834, 837 (2005) (distinguishing scope issue, which concerned use of a drug-detection dog at the traffic stop, from duration issue).[1]

The five other issues identified by respondent — whether the encounter was a traffic stop, whether the officers' questions were reasonably related to the stop, whether the officers had

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[1] Respondent in *Caballes* opposed certiorari on the same ground as respondent here. See Brief in Opposition, No. 03-923, at 4-5, 8 (arguing that opinion below presented duration issue). Illinois replied in *Caballes*, as it does here, that the state court relied solely upon the scope of the stop, not its duration, in finding a Fourth Amendment violation. See Reply in Supp. of Pet. for Cert., No. 03-923, at 1-2. This Court granted certiorari, and then held that duration, having played no role in the decision below, did not affect analysis of whether the canine sniff expanded the scope of the stop. See *Caballes*, 125 S. Ct. at 837.

reasonable suspicion to ask questions about contraband, whether respondent consented to the search, and whether the ensuing search was incident to arrest (see Opp. 11-12, 14-18)—are neither raised in the petition nor fairly included in the questions presented. Respondent's suggestion that Illinois may seek to smuggle those issues into its merits briefs, see *id.* 12 ("[Illinois has downplayed, perhaps only temporarily, its factual claims about the nature of the encounter in this case"), is without foundation. See Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); R. STERN, ET AL., SUPREME COURT PRACTICE 409-410 (8th ed. 2002). There is no prospect that the Court will have to wade through those issues, let alone resolve them in a certain way, in order to reach the questions presented.[2]

Before moving on, a brief reply to respondent's suggestions that the encounter here might not have been an actual traffic stop. See Opp. i, 11-12. To be clear, there was a traffic stop, and thus a Fourth Amendment seizure, by the time the officers questioned respondent about contraband. True, respondent initially pulled over to the shoulder on her own accord. Pet. App. 3a. However, moments later, "Officer Sprague told [respondent's companion] he was going to be arrested for

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[2] The point is illustrated by *Caballes*. There, Illinois unsuccessfully argued in state court that the officers had reasonable suspicion, then necessary under Illinois precedent, to conduct an exterior canine sniff of a vehicle at a traffic stop. See *People v. Caballes*, 207 Ill. 2d 504, 509-510, 802 N.E.2d 202, 204-205 (2003). Illinois did not seek certiorari on that issue, but instead presented only the question whether reasonable suspicion was necessary in the first place. This Court granted certiorari and resolved that question. See *Caballes*, 125 S. Ct. at 837-838. The fact that Illinois had unsuccessfully advanced *other* arguments in the state courts did not forestall certiorari because Illinois did not present those other arguments in its petition. The same principle obtains here.

driving on a revoked license." *Ibid.* At that point, the encounter unquestionably ripened into a Fourth Amendment seizure based upon a perceived traffic violation. And only after that point did the officers question respondent about contraband in the car. *Id.* 4a-5a. Thus, the questioning indisputably took place during a probable cause-based traffic stop.[3]

C. Illinois Did Not Forfeit Its Positions on the Questions Presented.

Respondent contends that Illinois forfeited its positions on the questions presented by not advancing them in the state courts. Opp. 1-2, 8, 25. This contention ignores the difference between a petitioner's "claim" and the "arguments" that the petitioner may make in this Court to support that claim.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Both here and in the state courts, Illinois has advanced precisely the same claim: the officers' questions at the traffic stop did not violate the Fourth Amendment. Settled precedent permits Illinois to present new arguments — including that the officers needed no reasonable suspicion to question respondent about matters unrelated to the justification for the traffic stop, and that *Terry* does not govern the validity of those questions — to support that claim in this Court. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of

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[3] Respondent twice notes Justice Schmidt's comment in dissent that the encounter "clearly was not" a "routine traffic stop." Pet. App. 11a (quoted in Opp. 1, 11). In context, Justice Schmidt meant not that the encounter was something other than a "traffic stop," but rather that the stop was not "routine" because respondent moved from the passenger seat to the driver's seat after the car pulled over but before the first officer arrived. *Ibid.*

the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee*, 503 U.S. at 535 (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"). Illinois practice has long been in accord. See, *e.g.*, *People v. Roberson*, 212 Ill. 2d 430, 440, 819 N.E.2d 761, 767 (2004), citing *Dineen v. City of Chicago*, 125 Ill. 2d 248, 265-266, 531 N.E.2d 347, 354 (1988) (forfeiture rule, which is discretionary, applies where issue is "not discernible from an examination of the proceedings in the courts below").

Even if Illinois' arguments on the two questions presented were characterized as "claims" rather than "arguments," there still would be no forfeiture. When this case was before the state courts, the Illinois Supreme Court had just decided *People v. Gonzalez*, 204 Ill. 2d 220, 226, 789 N.E.2d 260, 265 (2003), and *People v. Bunch*, 207 Ill. 2d 7, 15-17, 796 N.E.2d 1024, 1030-1031 (2003), cert. denied, 541 U.S. 959 (2004). As respondent recognizes (Opp. 2, 7, 8, 9), those cases held, adversely to Illinois, that *Terry* governs investigatory conduct unrelated to the traffic violation that justified the traffic stop, and that unrelated questioning at the stop violates the Fourth Amendment. It would have been futile in this case for Illinois to continue pressing its recently-rejected views below.

Under analogous circumstances — where lower court precedent rejected a party's position on a particular legal question[4] — this Court has routinely held that there was no

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[4] While this case was pending in state court, Illinois sought certiorari in *Illinois v. Bunch*, 541 U.S. 959 (2004). Illinois could not seek certiorari in *Gonzalez* because the Illinois Supreme Court, while adopting an unfavorable rule of law, gave Illinois the judgment. See *Mathias v. WorldCom Tech., Inc.*, 535 U.S. 682 (2002).

forfeiture for purposes of review in this Court. See, *e.g.*, *United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002); *Lebron*, 513 U.S. at 379; *United States v. Williams*, 504 U.S. 36, 43-45 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). This is particularly true where, as here, the court below "passed upon" the question presented in the petition. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

II. There Is a Deep, Intractable and Genuine Split on the Questions Presented.

Among federal courts of appeals and state courts of last resort, there is a deep split over whether the Fourth Amendment prohibits a police officer from questioning motorists about matters, such as the presence of contraband, unrelated to the traffic violation that justified the traffic stop. In addition to Pet. 6-8 (citing nine decisions), see *Campbell v. State*, 97 P.3d 781, 785 (Wyo. 2004) ("an officer generally may not ask the detained motorist questions unrelated to the purpose of the stop, including questions about controlled substances, unless the officer has reasonable suspicion of other illegal activity"). Two other such courts have acknowledged the split but declined to take sides. Pet. 8. Intermediate appellate courts in five States have joined the fray. *Id.* 6-7.

Respondent argues that there is no genuine conflict, but that the lower courts simply use "different verbal formulations in the course of their Fourth Amendment analysis." Opp. 20. That argument is preposterous. When several courts require an officer to have reasonable suspicion before asking a motorist about contraband, while several other courts impose no such requirement, the difference is a matter not of semantics, but of fundamentally incompatible legal rules. Thus, if a law enforcement officer in Illinois, having made a lawful traffic stop, questions the motorist about drugs but has no reasonable suspicion for doing so, whether the officer will be found to have violated the Fourth Amendment depends entirely upon whether

the prosecution proceeds in state or federal court. Compare *United States v. Childs*, 277 F.3d 947, 950-954 (7th Cir.) (*en banc*), cert. denied, 537 U.S. 829 (2002), with the decision below; *People v. Leigh*, 341 Ill. App. 3d 492, 496-497, 792 N.E.2d 809, 812-813 (2003); and *People v. Lomas*, 349 Ill. App. 3d 462, 469-471, 812 N.E.2d 39, 44-46 (2004).

Respondent maintains that "none of the cases" requiring reasonable suspicion "resulted in the suppression of evidence," but she is wrong. In Illinois alone, there is the decision below, *Leigh* and *Lomas*. There is also the Illinois Supreme Court's decision in *Bunch*, which, as respondent herself recognizes (Opp. 2, 8-9), affirmed the suppression of evidence after holding that questions unrelated to the traffic stop's purpose violated the Fourth Amendment. 207 Ill. 2d at 15-17, 796 N.E.2d at 1030-1031. There is also *Campbell*, where the Wyoming Supreme Court ordered the suppression of evidence after holding that the officer violated the Fourth Amendment by asking the motorist "whether he had 'high grade' marijuana in his vehicle while [the officer] was filling out the driver contact form." 97 P.3d at 785. See also *State v. Gibbons*, 248 Ga. App. 859, 863-864, 547 S.E.2d 679, 682 (2001); *State v. Taylor*, 126 N.M. 569, 575-577, 973 P.2d 246, 252-254 (App. 1998), cert. denied, 126 N.M. 534, 972 P.2d 353 (1999).

Thus, contrary to respondent's argument (Opp. 24), the courts' actual results have *not* "dovetailed," there *is* a "true conflict," and no conceivable marginal benefit would result from further percolation of this well-worn issue. The fact, emphasized by respondent (*id.* 2, 9), that this Court denied certiorari on the same question twice in 2002 and once in 2004 provides no basis to deny certiorari here.[5] To the contrary, the

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[5] The Court, of course, did not indicate why it denied certiorari in those three cases. In *Bunch*, petitioner argued that the officer, at the time he questioned the motorist, had probable cause to

split is even deeper now than it was then, creating an even greater need for this Court's intervention.

III. At a Minimum, The Judgment Below Should Be Vacated and Remanded for Reconsideration in Light of *Caballes* and *Muehler*.

The petition asks, in the alternative, that "because the Illinois Appellate Court's opinion is fundamentally incompatible with the principles set forth in [*Caballes*], the judgment below should be vacated and remanded for reconsideration in light of *Caballes*." Pet. 16. Tellingly, nowhere does respondent argue that the decision below is compatible with *Caballes*. Instead, respondent contends that Illinois' GVR request is "unsupported." Opp. 28.

Respondent is wrong. The petition demonstrates in detail why the appellate court's resolution of the questions presented cannot be reconciled with the Fourth Amendment principle underlying *Caballes* — *i.e.*, that the Fourth Amendment permits law enforcement officers, at a probable cause-based traffic stop, to conduct additional investigatory activities that do not effect an incremental search or seizure. Pet. 5, 10, 15-16. Because the opinion below was issued before *Caballes*, a GVR would be

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believe that the motorist possessed drugs. See Reply in Supp. of Pet. for Cert., No. 03-774, at 5-6. That argument, which Illinois does not make in this case, might have raised an obstacle to reaching the question presented. In *Childs v. United States*, 537 U.S. 829 (2002), the Seventh Circuit recognized that the case presented duration (and not just scope) issues, see 277 F.3d at 953-954, and the petition predated the Illinois Supreme Court's decisions in *Bunch* and *Gonzalez* and the Wyoming Supreme Court's decision in *Campbell*. In *Williams v. United States*, 535 U.S. 1019 (2002), the Tenth Circuit suggested that the officers had reasonable suspicion to question the motorist about his travel plans, see 271 F.3d 1262, 1267 (10th Cir. 2001), and the petition predated *Bunch*, *Gonzalez* and *Campbell*.

appropriate, just as it was in *Illinois v. Harris*, 125 S. Ct. 1292 (2005) (vacating decision that Fourth Amendment requires reasonable suspicion to conduct a warrant check of a passenger during a traffic stop, and remanding to Illinois court for reconsideration in light of *Caballes*).

A GVR is even more appropriate given *Muehler v. Mena*, 125 S. Ct. 1465 (2005), which was decided after the petition here was filed. Relying upon *Caballes*, *Muehler* held that a police office did not need reasonable suspicion to question an individual lawfully seized under *Michigan v. Summers*, 452 U.S. 692 (1981), about her immigration status. *Muehler*, 125 S. Ct. at 1471-1472. By the same token, and contrary to the judgment below, an officer does not need reasonable suspicion to question an individual lawfully seized at a traffic stop about contraband in her car.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the judgment below should be vacated and remanded for reconsideration in light of *Caballes* and *Muehler*.

Respectfully submitted.

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